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In the Supreme Court of the United States

OCTOBER TERM, 1966

No. 1003

JAMES R. HOFFA, BENJAMIN DRANOW, ZACHARY A. STRATE, JR., S. GEORGE BURRIS, ABE I. WEINBLATT, CALVIN KOVENS, AND SAMUEL HYMAN, PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinions of the court of appeals (Pet. App. A 1–31, 32–67),[1] are reported at 367 F. 2d 698, 716.

JURISDICTION

The judgment of the court of appeals was entered on October 4, 1966 (Pet. App. B). A petition for re-

[1] For our record references we refer primarily to petitioners' three-volume appendix (herein "A.") and the government's one-volume appendix ("G.") in the court of appeals. We also occasionally refer to the multi-volumed trial transcript ("Tr."). All of these documents are part of the certified record on file with the Clerk of this Court.

hearing *en banc* was denied on November 28, 1966. On December 15, 1966, Mr. Justice Clark granted an extension of time until January 26, 1967, within which to file a petition for a writ of certiorari. The petition was filed on January 25, 1967. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether the evidence adduced by the government supported the finding of the jury that petitioners were members of a single conspiracy to defraud the Teamsters Pension Fund.

2. Whether the trial judge erred when, without advising the parties or their counsel, he instructed the bailiff to deliver the indictment to the jury at its request shortly after it had commenced its deliberations.

3. Whether the trial judge properly denied a motion for a new trial based on an alternate juror's post-verdict allegations of improprieties.

4. Whether the jury was adequately shielded from prejudicial newspaper publicity.

5. Whether it was reversible error for government counsel to ask petitioner Hoffa, on cross-examination, about a federal conviction then pending on appeal (and since affirmed).

6. Whether the trial court committed error in various procedural and evidentiary rulings during the trial.

7. Whether the trial court erred in failing *sua sponte* to order that petitioner Dranow be examined to determine his mental competency to stand trial.

8. Whether testimony relating to certain letters allegedly written by petitioner Dranow was prejudicial, even though the jury was subsequently told by the trial judge to disregard such testimony.

STATEMENT

Petitioners were convicted after a trial by jury in the United States District Court for the Northern District of Illinois on various counts of a 28-count indictment, returned on June 4, 1963, charging mail and wire fraud in violation of 18 U.S.C. 1341 and 1343, and conspiracy (count 28) to commit such offenses (I A. 41–77).[2] They were variously sentenced to fines and imprisonment (I A. 31–32, 296–305; III A. 2245–2257).[3] The sentence of each is fully supportable

[2] Herbert Burris was acquitted by the trial judge on all counts at the close of the government's case-in-chief. At the same time, on the government's motion, the court dismissed counts 10 and 18 and granted motions for judgments of acquittal on counts 2, 5, 11, 26 and 27 as to all the petitioners (III A. 1773).

[3] *S. George Burris*—$5,000 fine and eighteen months' imprisonment on count 28 with concurrent eighteen-month prison terms on each of counts 1, 6, 9, 21.

Benjamin Dranow—5 years' imprisonment on count 28, with concurrent 5-year prison terms on each of counts 1, 6, 9 and 21; this sentence to run consecutively to a sentence presently being served.

James R. Hoffa—$10,000 fine and five years' imprisonment on count 28, with concurrent 5-year prison terms on each of counts 1, 22 and 23; this sentence to run consecutively to the sentence imposed under a conviction in the United States District Court for the Eastern District of Tennessee.

Samuel Hyman—$5,000 fine and a year and a day imprisonment on count 28, with concurrent year-and-a-day prison sentences on each of counts 1, 12, 14, 19, 20, 24, and 25.

Calvin Kovens—$5,000 fine and three years' imprisonment on

on the conspiracy count. The court of appeals affirmed, one judge dissenting (367 F. 2d 698, 716; Pet. App. A).

I

THE SCHEME CHARGED IN THE INDICTMENT

The indictment alleged, in essence, that petitioners conspired to and did defraud the Teamster Pension Fund[4] by "submitting false and misleading statements of material fact and by concealing material facts in order to obtain loans from the Pension Fund; and diverting, through various fraudulent devices, substantial amounts of the loan proceeds for their personal use and benefit" (I A. 46).

Dranow and Burris (and sometimes Kovens) would contact potential applicants for Pension Fund loans and, for a fee, would undertake to act as their agents in the procurement of such loans, representing that they were able to obtain them because of their special relationship with petitioner Hoffa, the president of the International Brotherhood of Teamsters, president of Teamsters Local 299 of Detroit and a Trustee of the Pension Fund. Among the loan applicants were petitioners Kovens, Strate and Hyman (I A. 46–49). The various loan applications con-

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count 28, with concurrent 3-year terms on each of counts 1, 6, 7, 9, and 21.

Zachary Strate—$5,000 fine and three years' imprisonment on count 28 with concurrent 3-year terms on each of counts 1, 3, 4, 8, 13, 15, 16, and 17.

Abe I. Weinblatt—$5,000 fine and one hour in custody on count 28, with a concurrent one-hour term on count 1.

[4] Officially known as the Central States, Southeast and Southwest Areas Pension Fund.

tained material falsifications and concealed material facts (I A. 50–53). Hoffa actively utilized his status and position to influence approval of these fraudulent applications, making misrepresentations to, and concealing material facts from, the other trustees (sixteen in all) and staff members of the Fund (I A. 42, 49–50).

The indictment further alleged that petitioners caused in excess of $1,000,000 of fraudulently obtained loan proceeds to be diverted to their own personal use (I A. 53–54), and that more than $100,000 of diverted loan proceeds were applied to aid in the repayment of debts incurred by Sun Valley, Inc., a Florida real-estate corporation in which Hoffa had a substantial personal interest. Repayment of its debts enabled Sun Valley to extricate itself from reorganization proceedings and enabled Hoffa to withdraw $400,000 in Teamster funds deposited in a Florida bank in a "restricted" account as security for the bank's loans to Sun Valley which the bank had refused to release until Sun Valley repaid its loans (I A. 43–44, 54).

II

THE GOVERNMENT'S EVIDENCE

Since the principal basis of the dissent below is that the government's proof failed to establish a single conspiracy (see 367 F. 2d at 724–733; Pet. App. A 50–67)—a view urged by petitioners in this Court—we deem it appropriate to set forth the evidence in some detail.[5]

[5] The facts relating to petitioners' other allegations are set out in the pertinent portions of the Argument.

We start with a summary of the financial difficulties in which Sun Valley found itself in 1958, the impact that this had on petitioner Hoffa's Detroit local and the initial efforts by Hoffa, Dranow and Burris to rescue Sun Valley from its financial plight. We then describe the various Pension Fund loan transactions engaged in by petitioners, a description which will serve to illuminate the nature of the fradulent scheme triggered by the Sun Valley problem and the roles played by the various petitioners. Finally, we note how portions of the fraudulently obtained loan proceeds were utilized to help revitalize Sun Valley.

A. SUN VALLEY

1. Sun Valley, Inc., was formed in 1954 to engage in real estate development and promotion. It sold Florida homesites to Teamster members and others and its lots were advertised at Teamster meetings (G. 354–355; II A. 1406, 1468; III A. 1858, 1975–1976). The president of Sun Valley was Henry Lower, a Teamster official who had done public relations work for Hoffa's Local 299 of Detroit (I A. 589, 609–610; II A. 1468–1469). Pursuant to an undisclosed agreement entered into in January 1955, Lower secretly held 22½ percent of Sun Valley stock in trust for Hoffa (G. 147–148).* Hoffa also had an option from Lower to buy 45 percent of Sun Valley stock for $27,000 (G. 148), and had cosigned $75,000 worth

* This agreement, bearing Hoffa's signature (I A. 612; II A. 1471–1472), first came to light, after Lower's death, when it was discovered hidden in a cookbook in Lower's desk (I A. 619).

of Sun Valley notes on which he would be liable if the corporation defaulted in its obligations (III A. 1980–1981).

In 1956, Sun Valley applied to the Florida National Bank of Miami for loans. It was agreed as a condition thereof that Hoffa's Detroit Local 299 would at all times maintain on deposit at the bank, in a non-interest bearing "restricted" account, an amount of money equal to or in excess of any outstanding loans made by the bank to Sun Valley (I A. 587–589, 597–598, 600–601). As of December 1956, $400,000 of Teamster funds, sent down by petitioner Hoffa, were in the bank in this restricted account, and Sun Valley was indebted to the bank for $399,000 (I A. 586–596, 591–592, 600–601; G. 259).

In late 1957 or early 1958, Sun Valley became delinquent in its loan obligations and the bank thereafter obtained a judgment against it in the amount of $399,000 (I A. 600–602; II A. 1399). In July 1958, Sun Valley filed a petition for reorganization under the Bankruptcy Act because it "was unable to meet its current liabilities as they became due" (I A. 556; III A. 1756).[7] In the late summer and early fall of 1959, Hoffa attempted, on three separate occasions, to withdraw Local 299's $400,000 deposit. The bank refused payment, invoking the "restricted" account agreement (I A. 595, 597; see also I A. 590–591). The de-

[7] These proceedings, originally instituted in the United States District Court for the Eastern District of Michigan, were, in September 1959, transferred to the United States District Court in Orlando, Florida (II A. 1406–1407).

posit of Local 299's funds in the bank and Hoffa's connection therewith and with Sun Valley were the subject of investigation by a Senate Committee in 1958 and of a grand jury investigation in Florida in 1960 (I A. 660, 675–676; II A. 1465–1469).

2. In the summer of 1958, shortly after Sun Valley had gone into reorganization, Dranow telephoned Stanton Sanson, a Florida business man (I A. 559, 564–565), and put Hoffa on the telephone. Hoffa told Sanson that he was anxious to get someone of Sanson's "standing" to revitalize Sun Valley; that this was a "must proposition" for him; and that it was "something that had to be done." He said that if Sanson agreed to take over Sun Valley, his pending loan application with the Pension Fund[8] would be approved and Pension Fund loans would also be made available for the development of Sun Valley (I A. 558–559). Sanson thereafter met with Dranow and Weinblatt—Dranow's financial nominee (III A. 1868, 1883–1884, 1953–1954). After investigating Sun Val-

[8] Sanson testified at the trial that some time before this conversation Dranow had told him that his loan "would be put through" for a 10% commission. The matter was dropped, however, when Sanson told Dranow that the commission arrangement would be specifically noted on the commission check (I A. 561–562, 565, 568, 648, 652). At Dranow's notification, Sanson came to Chicago to make a personal appearance before the Pension Fund Trustees in connection with the pending loan application (I A. 562). When advised that he was not on the trustees' agenda, Sanson notified Dranow who told him he would do something about it immediately. Sanson then returned to the trustee room and shortly thereafter Hoffa was called to the telephone. After this Hoffa told Sanson and an associate not to "worry, you will be heard". Shortly thereafter Sanson presented his case to the trustees (I A. 646, 648, 649).

ley, Sanson turned down Hoffa's offer (I A. 558–567, 642–645).* At about the same time Sanson's pending loan application was rejected (I A. 648).

3. In September 1958, petitioner Burris—earlier introduced by Dranow to Stanton Sanson as a "very close" friend, who had "great influence" with the Teamsters (I A. 562)—incorporated Union Land and Home Company (hereafter "Union") for the purpose of revitalizing Sun Valley (G. 93–94; I A. 562; II A. 1407; III A. 1983). Burris was acting as Dranow's "agent" in the transaction (G. 76, 79–80; I A. 562; II A. 1466). Hoffa knew of Dranow's unrevealed interest in the company (III A. 2015). In November 1958, Hoffa and Burris agreed that Union would pay off the promissory notes that Hoffa had cosigned for Sun Valley; that Union would also reimburse Hoffa's Detroit Local 299 for the interest lost on the $400,000 tied up in the restricted non-interest-bearing account in the Miami bank; and that, in exchange, Hoffa would give up his option to purchase Sun Valley stock (III A. 1981–1982). Union ultimately paid off all of Sun Valley's debts and took it out of reorganization, in substantial measure with money obtained through proceeds of Pension Fund loans, as hereafter described.

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*Sanson initially prepared an extensive negative report on the Sun Valley development (G. 174–186). However, after meeting with Dranow and Weinblatt, at Dranow's request, he softened the report's tone (I A. 560–561). Pursuant to Dranow's instructions, Sanson had the report hand-carried to Weinblatt with a cover letter, addressed to Dranow (G. 174–175; I A. 561).

B. THE MAJOR LOAN TRANSACTIONS

1. *The Connelly-Everglades transaction*

a. In the summer of 1958—at about the time Hoffa unsuccessfully sought to induce Sanson to take over Sun Valley and shortly before Burris and Dranow formed Union—Vaughan Connelly, owner of the Everglades Hotel in Miami, Florida, needed funds to finance renovation of his hotel which was to be performed by petitioner Kovens, a Miami contractor (I A. 623–624, 625–626, 688, 692, 770). Kovens suggested that Connelly seek a Pension Fund loan. When Connelly mentioned that it might "facilitate" the loan if he took over some Teamster property, Kovens suggested that Connelly take over Sun Valley (I A. 626). Shortly thereafter, Kovens brought in Dranow (at first under an assumed name) as a man "who could secure the loan with the Teamsters" (I A. 627–628). Dranow, in turn, brought in petitioner Burris as "an accountant for the Teamsters Pension Fund" (I A. 769) who "handled all his Teamster loan applications" (I A. 628).

In September 1958, Connelly, with Burris' assistance, filed an application for a $3,300,000 Pension Fund loan (I A. 628–629), for the procurement of which Connelly agreed to pay Dranow a $300,000 "fee" (I A. 628–629). At Dranow's direction, a copy of the loan application was forwarded to Hoffa (I A. 628, 653, 767). Meetings were thereafter held among Connelly, Kovens, Dranow and Hoffa to see if Hoffa could get the loan expedited (I A. 631).[10] At one of

[10] Connelly was advised of one of these meetings by his accountant who, after talking with Kovens, left a message: "Cal

these meetings, Dranow mentioned to Hoffa that Connelly was interested in Sun Valley, but Hoffa did not want to talk about it at the time (I A. 631). Dranow subsequently informed Connelly that "the boss" was trying to "loosen up the delays" (I A. 635). In December 1958, Connelly spoke with Hoffa directly in an effort to expedite the loan (I A. 636, 653). In January 1959, the loan application was approved by the trustees (including Hoffa) and Connelly received the first draw of $1,000,000 (I A. 655; see also I A. 636).

Dranow and Kovens then advised Connelly that the fee would have to be paid "immediately" and "under the table" (I A. 629–630, 656) and "that Mr. Hoffa was raising hell and expected it because he had paid all the money" (I A. 656). When Connelly balked at the need for immediate payment, both Dranow and Kovens told him that they did not want to see him hurt but that "these boys play rough" (I A. 657–658). The next day, Connelly delivered $100,000 to Dranow and Kovens in "small bills". Kovens burned the wrappers; Dranow stuffed the money in a bag, saying he was going "to Washington to deliver the money to the Boss" (I A. 658–659).[11]

b. In May 1959, both Dranow and Kovens advised Connelly "to keep out of sight" because Senate Com-

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was in. Said nothing new on the loan. Is going to try and get you and Grossman [Dranow] together Tuesday. The wheel, Mr. H., is going to be in town the latter part of the week, and will probably get to meet you on Friday, according to Cal" (I A. 767).

[11] At the time, Hoffa had an apartment at the Woodner Hotel in Washington, D.C. (II A. 1077; I A. 636, 653).

mittee investigators were in Miami "trying to link up Dranow and other pension [Fund] loans with the Teamsters and with Mr. Hoffa" (I A. 666). Connelly thereafter falsely denied to Senate investigators that Dranow was involved or that he had made "payoffs" for his Pension Fund loan. Hoffa subsequently thanked Connelly for his "fine statement", telling him that "he appreciated it" (I A. 674).

c. By late Spring of 1959, when Connelly was in need of another loan, Dranow said he could arrange it but that it was "going to cost more money" (I A. 663–664). Dranow and Burris thereafter helped with the preparation of the application for a $1,000,000 loan (I A. 664–665, 666–667), which, in July 1959, on Hoffa's motion, was tentatively approved by the trustees (II A. 1485–1486; I A. 666–667). When Connelly told Hoffa he needed the money immediately, Hoffa said he would get it, called an adjourned trustee meeting back to order, and informed the trustees that "Connelly has got to have his check today." Connelly received the check that same evening. At the time of receipt of the check, certain of the conditions under which the loan had been approved by the trustees were not yet satisfied—*i.e.*, the required mortgage on the property had not been executed (I A. 668; II A. 1485); the required inspection and appraisal of the property had not taken place (II A. 1485–1486; I A. 826); and the requisite Pension Fund service charge of $5,000 had not been paid (II A. 1489–1490; I A. 668).

d. In the early winter of 1960, Connelly talked to Hoffa about a "moratorium" on his Pension Fund

loan payments because of his tight financial position (I A. 671–672). Hoffa agreed to help. He advised Connelly to make his written request for a moratorium "stronger" and to get it to the Fund prior to a March 15 meeting of the trustees. Hoffa further advised him to stay away from that meeting, saying "I will call you if I need you" (I A. 673). The moratorium was thereafter granted (I A. 673).

e. In April 1960, Connelly appeared before a federal grand jury investigating Sun Valley and the Pension Fund. Kovens told him not to produce records showing his transactions with Dranow (I A. 675). After Connelly's appearance, he told Dranow that he made "false statements" to the grand jury. Dranow responded that it probably did not matter "because he had been in Orlando concluding a sale of Sun Valley property, and that it was being sold for a figure at a higher price than Mr. Hoffa or the Teamsters had put a loan on there * * * [and] that the grand jury would never, under those circumstances, in his opinion, return an indictment against Mr. Hoffa" (I A. 676). Two months later the Pension Fund foreclosed its mortgages on Connelly's hotel (I A. 676, 731). Almost $400,000 had been paid by Connelly as "fees" (I A. 676). About $15,000 of Connelly's receipts went toward the financial rehabilitation of Sun Valley (see *infra*, p. 32).

2. *The Strate-Pelican transactions*

a. In 1958 and 1959, petitioner Strate's Pelican States Hotel Corporation was building the Fontainebleu Motor Hotel in New Orleans, on leased land (II A.

1056–1059; 1100–1101; 1136–1137). During that period a number of Pension Fund loan applications for long-time financing were rejected by the trustees (II A. 1124–1126, 1151–1152, 1331–1332). As Hoffa explained it at a trustee meeting in March 1959: "We are very concerned about the question of leased land. * * * We cannot see the leased land" (G. 66).

In late April 1959, Kovens, who was approached concerning a Pension Fund loan, referred Strate's group to Dranow (II A. 1128–1129). After numerous arrangements concerning fees and methods of payment (II A. 1060–1063, 1130, 1136–1140; 1102–1103), it was agreed that Dranow would attempt to obtain a $1,350,000 Pension Fund loan for the Fontainbleu for a fee of $155,000 (II A. 1060–1063, 1102–1103). The loan application was filed by Strate on June 6, 1959 (G. 324). On June 15, he was introduced by Hoffa at a trustee meeting. Hoffa advised his fellow trustees of the pertinent factors relating to the loan, but made no mention of the "leased land" problem. The $1,350,000 loan was tentatively approved at this meeting. In July 1959, on Hoffa's motion, the trustees gave it final approval (II A. 1502–1505).

The next day, Dranow met with Strate and the latter's associates, informed them that the loan had been granted and demanded a $50,000 advance on his fee. He telephoned a Fund official and put Strate on the telephone so that the latter could be assured that there had been official approval of the loan (II A. 1064–1065). Dranow became excited when a suggestion was made that he be paid by check, saying he

did not know how this would look "with his people" (II A. 1066). During the next month, Strate delivered to Dranow more than $150,000 in cash which came from the Pension Fund loan proceeds (II A. 1066–1068, 1078, 1080, 1104, 1106, 1144).[12]

b. Shortly afterwards, Dranow agreed to procure another Pension Fund loan in exchange for a substantial stock interest in Pelican (II A. 1068–1071). At this time, George Burris was brought in as Pelican's auditor. In September 1959, Strate applied for a Pension Fund loan of $1,775,000, for additional construction at the Fontainebleu (II A. 1069–1070; 1506–1508), increased to $2,325,000 shortly thereafter for the addition of a restaurant (II A. 1507–1512). Preliminary approval from the trustees was obtained with the condition that the Pelican owners show a "firm commitment" in the project of one dollar for every two dollars to be loaned by the Fund (II A. 1505–1506, 1508–1509; see also II A. 1060–1070).

During the extended negotiations for the $2,325,000 loan the following representations (among others) were made by Strate to the Fund: (1) that Pelican had paid its architect, Tony Sherman, $72,000 for work on additions to the Fontainebleu whereas, in fact, Sherman had been paid only $30,000 for this purpose (II A. 1510; G. 120, 125; II A. 1155–1156; see also II A. 992); (2) that Pelican had $250,000 on deposit at the First National Bank of Gretna, Louisiana as part of its required equity (G. 119) whereas, in fact, this amount had been borrowed from the bank on the

[12] At this time Strate told Vaughan Connelly of the New Everglades that he was paying money to Dranow (I A. 675).

understanding that it would not be spent for the hotel and the money was withdrawn when "everything had been checked out relative to the loan" (II A. 1074–1076); (3) that some $575,000 of the loan proceeds would be spent on construction of a restaurant (II A. 1511–1512, 1516–1517) whereas, in fact, Strate did not intend to build such a restaurant (II A. 1075–1076) and no effort was ever made to build one.[13]

By January 1960, Pelican had not yet fulfilled the one-third "irrevocable share" requirement (II A. 1506; see *supra*, p. 15). On January 12, 1960, Hoffa, in a telephone conversation with the Fund's appraiser (Morris Lieberman), stated that the sponsors of the Fontainbleu would have $150,000 in the "till" within sixty days—"the amount of additional cash (one-third) required of the sponsors, to have in the project prior to any commitment" by the Fund (G. 126; I A. 830–831). The Fund thereafter issued its letter of commitment (G. 126–127), but the money was never contributed.

c. In the Spring of 1960, Dranow took Warren Rose, one of Strate's associates, on a tour of Sun Valley, told him that the company was "in some sort of bankruptcy proceedings" but that there "would be no difficulty selling all the lots in the subdivision with the help of Mr. Hoffa" (44 Tr. 6871). He asked Rose to invest in the project. Rose thereupon loaned Dranow $20,000, making the check payable (at Dranow's request) to petitioner Burris (II A. 1082).

[13] As was brought out in cross-examination of Strate, it was not until a year later (December 1960) in connection with a later Pension Fund loan that the Fund eliminated the requirement that the proposed restaurant be built with loan proceeds (102 Tr. 14612–14614).

In September or October 1960, Strate told Warren Rose that Dranow had told him he had "to put up" $50,000 for Sun Valley; that Dranow further advised him that Kovens and Hyman were also each required to provide $50,000 but that Kovens had not yet met his obligation (II A. 1084).

d. Government accounting evidence at trial showed that between March 1960 and November 1961, Pelican Corporation received some $3,350,000 from the Pension Fund for construction (III A. 1590–1592),[14] but only $2,100,000 of this amount was actually expended on new construction (III A. 1594). Almost $1,000,000 of the proceeds were used by Strate for stock purchases, repayment of loans and payments to himself (III A. 1592). In addition, $168,000 directly traceable to loan proceeds, went through Strate to Dranow ($55,125), to Weinblatt ($105,375) and to Bene Originals ($7,501), a corporation owned by Dranow (G. 246–255; III A. 1869).

In mid-1961, Strate advised the architect of the Fontainebleu, that he was going to replace Kovens as a builder and "build hotels all over the world" and that "he could get all the mortgages required because he had direct contact with Mr. Hoffa" (II A. 1156).

3. *The Hyman-Key West Foundation transactions*

a. In the Spring of 1959, petitioner Hyman, who, together with his wife, owned 50 percent of the stock of the Key West Foundation Company of Key West, Florida, agreed to pay petitioner Burris a fee if the

[14] In December 1960 and March 1961, Pelican had obtained two additional Pension Fund loans for construction at the Fontainebleu totalling $1,000,000 (G. 127).

latter would obtain a Pension Fund loan for Key West (II A. 879, 892–894, 896–899). An application was thereafter filed requesting a $875,000 loan, which listed as one of its purposes the building of a shopping center (G. 128–129). At a June 15 meeting of the trustees, Hyman stated that he expected to spend "$110,000, $115,000" on the shopping center (II A. 1493) and another $115,000 to pay off mortgages on apartment buildings owned by Key West (II A. 1491). He did not explain how the balance of the $875,000 was to be used (II A. 1490–1493).

Some five weeks later, the trustees (with Hoffa presiding) approved the $875,000 loan. It was described in the authorizing motion as "a construction loan to be converted to a first mortgage when the shopping center is finally built" (II A. 1493–1494). In the Fund's preliminary commitment letter of August 3, 1959, signed by Hoffa and another trustee, setting forth the conditions of the loan, it was stated as "understood" that the loaned funds would be used to construct the shopping center (G. 287–294). In the next few weeks, however, amendments (again bearing the signature of Hoffa and another trustee) were made providing that a portion of the loan could be used to pay off existing mortgage loans on Key West's apartment houses (G. 281–283); that Hyman could draw $715,000 of the loan proceeds as soon as the loan was finally approved, the remainder to be drawn during the course of construction of the shopping center (G. 284–286); and that $160,000 of the loan was for construction (G. 285). There is no indi-

cation that any of these revised conditions was ever discussed or approved at trustee meetings.

In the early fall of 1959, Dranow told Vaughan Connelly of the New Everglades, that he was trying to get a Pension Fund loan for Key West which would be sufficient to pay off the mortgages on the apartment houses and still leave Hyman $300,000 cash, and that this amount and "other monies" coming to Dranow could then be used "for helping on the Sun Valley Payment of the loan to get Mr. Hoffa out of his loan position" (I A. 671).[15]

b. The loan funds were disbursed in November 1959 (III A. 1689–1690). Approximately $500,000 was diverted from Key West Foundation by Hyman as follows: $125,000 to purchase the stock of co-owners (Dr. and Mrs. Maurice Rose) in Key West Foundation (II A. 880–881, 894; III A. 1692); $200,000 to Hyman and his wife (III A. 1692); $75,000 to Hyman's Acme Corporation (III A. 1692; G. 351–352); $100,000 through Acme Corporation to Burris' Zenith Corporation and through Zenith to Burris, Dranow and their associates (G. 168–169, 347). The payment of $100,000 to Zenith Corporation was made at the request of petitioner Burris and represented Hyman's investment in Union, the company formed to take Sun Valley out of bankruptcy (II A. 894–895, 900; see *supra*, p. 9).

c. In May 1960, Hyman filed another loan application, this time for a $400,000 Pension Fund loan to

[15] Dranow also told Connelly that "he had talked to Mr. Hoffa" about using some of the Key West Loan money to aid New Everglades (I A. 674).

renovate and remodel the Poinciana Apartments in Key West (G. 132–133, II A. 1497). At a trustee meeting in June 1960, Hoffa urged approval of the loan stating that "Sears Roebuck is building a $55,000,000 expansion there * * *. They own the whole thing. The shopping center is within one block of the apartments" and that, in addition, "the government is moving in 15,000 people to Key West" (II A. 1497). On Hoffa's motion, the trustees immediately approved the $400,000 remodeling loan (II A. 1497–1498). In actual fact, Sears was not then spending or contemplating spending $55,000,000 [16] or any money on a shopping center in Key West, it was merely spending money on routine maintenance in its catalogue sales office (III A. 1732, 1734); nor was the government contemplating the movement of any additional personnel to Key West (III A. 1735–1736).

A condition of the $400,000 loan was that the total cost of remodeling be not less than $600,000 (G. 134–135)—*i.e.*, Hyman would have to expend one dollar for every two dollars loaned by the Fund. Additionally, to secure construction "draws", detailed, written proof of expenditures had to be submitted to the Fund (G. 135–137; II A. 904, 907–908). By November 1960, Hyman had withdrawn the full $400,000

[16] The reporter who transcribed the minutes of this trustee meeting testified that the 55 million dollar figure was a typographical error and that it should read 5 million dollars (III A. 1851–1852). But she earlier testified that she never received any complaint from the Pension Fund as to the accuracy of her transcriptions (I A. 620). And, in any event, the evidence showed that Sears was planning to do no more than routine maintenance in a single office.

(G. 323–324; II A. 918–919) on the basis of documentary "proof" purporting to establish the expenditure of $706,000 on remodeling. This "proof" was false in the following respects:

(1) The documents purported to show a payment of $50,400 to Mid-Florida Paving Company (G. 142; II A. 908). Actually, Mid-Florida had been paid "around $10,000 or $12,000" (II A. 935–936). The signature of its owner on various receipts submitted by Hyman to the fund had been forged (II A. 938–939).

(2) The documents purported to show a payment of $656,000 to Black Construction Company (G. 138–145). The "Black Construction Company" was actually Cecil Black, a salaried employee, doing carpentry and masonry work at the Poinciana apartments with some helpers. During the period in question, he never received more than $125 per week for himself (II A. 919–930).[17] Some $50,000 of this loan actually was used to pay off Sun Valley creditors (see *infra*, p. 32).

d. Government accounting evidence based on the books and records of Key West Foundation revealed that during the period February 1960 through October 1960, less than $186,000 (not $706,000 as asserted

[17] Black testified further that Hyman purchased the Black Construction Company stationery (II A. 920, 923), provided the telephone number (II A. 924) (since Black had no office (II A. 919)), and prepared the waivers of lien because Black did not know what they were (II A. 923–924). Black would sign the waivers without reading most of them (II A. 924–925). He signed these waivers because he liked Hyman and wanted to help him (II A. 934).

by Hyman) had been spent on construction and maintenance (III A. 1693). From November 1959 through December 1960 (*i.e.*, the period covering the first and second loan), the company's total expenditures on construction and maintenance did not exceed $252,000 (III A. 1693). Petitioner Burris' accounting firm did the auditing during this period (III A. 1720, 1776).

e. In 1962, Hyman obtained Pension Fund loans for two hotels he owned in Key West—La Concha and the Casa Marina—in the amount of $433,000 with the promise that $217,000 more would be forthcoming, if the hotels were leased to a responsible hotel operator (G. 295–310, II A. 890–891; I A. 828–829). Shortly thereafter, Hyman signed leasing agreements for both hotels with Charles Lavin, an alleged operator of hotels for retired persons, who was then working for Hyman as a salaried employee at $100 per week (II A. 882–888). Lavin supplied Hyman with a letter, which Hyman forwarded to the Fund, promising high earnings for both hotels (II A. 887–889). The additional $217,000 was thereafter authorized by the trustees and disbursed to Hyman (G. 303–304). Lavin operated neither hotel under the leases and was discharged after Hyman had received the additional loan funds (II A. 882, 890).

4. *The Dranow-Burris First Berkeley transactions*

a. In 1959, First Berkeley Corporation of Los Angeles, California, was formed by petitioner Burris, who became its President, with Irving Link and Samuel Rosenberg as officers (II A. 1171, 1188, 1220). Some time before, Dranow had told Link and other

potential California investors that he was in a good position to secure Pension Fund loans because he knew Hoffa "very well" (II A. 1191, 1189, 1220, 1221) and that his associate, George Burris, was "the medium" for drawing up Pension Fund loan applications (II A. 1184–1190, 1219–1220).[18] In March 1960, the Pension Fund granted First Berkeley a loan of $2,966,000 (on the applications prepared by Burris, II A. 1192, 1193) to purchase the Connell buildings in downtown Los Angeles. The loan was secured by a mortgage on these buildings and was granted on condition that First Berkeley post substantial additional collateral (II A. 1534–1536).

The following false representations were made (primarily in papers filed with the Pension Fund on March 12, 1960):

(1) That the net worth of the corporation was $3,673,600 (G. 314–315). In reality, its net worth at that time was $634.17 (II A. 1559–1560).[19]

(2) That First Berkeley owned 97½ percent of the stock in Ruedd, Inc., which had a value of $680,550 (G. 315, 321). In reality, petitioner Kovens, not First Berkeley owned Ruedd, Inc., and Kovens had allowed First Berkeley to pledge his shares in Ruedd for $75,000 (G. 351).

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[18] Dranow also advised the California group at this time that he had obtained loans for the Fontainebleu, the Everglades and for a "Miami Hospital"—the Good Samaritan Hospital loans discussed *infra*, pp. 25–28.

[19] On the same date that this $3,673,000 figure was submitted, Dranow wrote to the Fund that "the lowest value you can really place on our equity" was close to $2,700,000 (G. 322).

(3) That First Berkeley owned the Fashion Mart building in Miami, which had an appraised value of $675,000 and a net value of $380,000 (G. 315, 321). Actually one Irving Kipnis (for whom Burris was then negotiating a Pension Fund loan on other property) (II A. 1384–1386),[20] had purchased Fashion Mart for $375,000 with 57 to 58 thousand dollars down and the remainder in purchase money mortgages. At the end of March 1960, he sold his equity in the building to First Berkeley for $85,000. The promissory note given to him in this amount was signed by George Burris and cosigned by one Lou Poller (II A. 1384, 1385).

(4) That Charles Gouert, a Los Angeles appraiser, had appraised the Connell buildings as having a market value of $4,250,000 and the Beverley Wilshire Health Club (for which another Pension Fund loan was granted) in which First Berkeley had a leasehold, at $942,500 (G. 318, 321). In actual fact, Gouert had never appraised the Connell buildings and had appraised First Berkeley's leasehold interest in the Health Club at $300,000 (II A. 1419).

On April 1, 1960, when First Berkeley had a bank balance of $194.66, it deposited $150,000 of the Pension Fund loan proceeds in its account. From these funds, $10,000 was paid to petitioner Burris and $75,000 to Kovens' Ruedd, Inc. (II A. 1565–1567; see G. 354). On May 12, 1960, the $2,816,000 balance of the loan was applied to the purchase of the Connell buildings (II A. 1570–1571).

b. On May 18, 1960, Dranow told Irving Link (an

[20] The Kipnis Causeway Inn transaction is outlined, *supra*, pp. 20–21.

officer of First Berkeley) that he needed $125,000 "immediately" to "divert some of it to a Sun Valley problem they had" (II A. 1193). Link and his associate, Murray Randolph, thereupon borrowed $125,000 from one Jack Factor, and made it available to Dranow and Burris (II A. 1194–1196). Portions of these funds went to pay interest to Teamsters' Local 299 and to pay off Sun Valley creditors (G. 453–455; see *infra*, p. 32).[21]

5. *The Kovens-Good Samaritan Hospital transactions*

a. In the summer of 1959, petitioner Kovens and one Bert Sager decided to apply for a Pension Fund loan to build the Good Samaritan Hospital in Miami, on land under lease to Kovens' Ruedd Corporation[22] (II A. 1303). Petitioner Burris helped in the preparation of a loan application (II A. 1273–1274, 1303–1305). In late September 1959, Sager appeared at a trustee meeting and requested a $2,300,000 loan. It was approved at 6½ percent interest with the proviso (stated by Hoffa) that the borrower would have to put $950,000 in escrow before any of the loan proceeds would be paid. Sager advised that he intended to sell debentures to obtain the $950,000 (II A. 1305–1306; G. 170).[23]

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[21] Funds from an additional Pension Fund loan to First Berkeley in 1961 was used to pay third parties from whom monies had been borrowed to repay the earlier "Factor" loan (G. 455–459).

[22] Ruedd was the corporation whose stock Kovens had "loaned" to Burris and Dranow in the First Berkeley deal (see *supra*, p. 23).

[23] In October 1959, Dranow, Burris and Strate pointed out a site in Miami to one of Strate's associates and stated "they were going to build a Hospital there" (II A. 1143–1144).

In December 1959, having been advised by Kovens that Sam Rosenberg (one of Dranow's associates in the First Berkeley Corporation, *supra*, p. 22) was going to provide a substantial amount of the needed capital, Sager so informed the Pension Fund (G. 341–342; II A. 1307). Rosenberg was notified by Fund representatives who asked what steps he had taken in this direction (G. 171; II A. 1223–1224). Rosenberg was "shocked" when he received the Fund's letter since he had never heard of the matter. He discussed it with Dranow who told him to "[f]orget it" (II A. 1223–1224).

Kovens thereafter told Sager that he would purchase $750,000 in debentures, that Rosenberg would put up the remaining $200,000 and that the Fund should be so advised (II A. 1308–1309). On January 12, 1960, Hoffa informed the appraiser for the Pension Fund that he could proceed with the appraisal because $750,000 in debentures had been sold and the hospital sponsors had received an additional $200,000 (G. 172; I A. 833). In fact, no debentures were ever issued or sold, nor did Rosenberg invest $200,000 in the hospital (II A. 1224, 1309).

In May 1960, Hoffa urged at a trustee meeting that final approval of the loan be granted, at a lesser rate of interest than had originally been fixed by the trustees—*i.e.*, 6¼ percent instead of 6½ percent. Hoffa further stated at this meeting that "the Dade County people themselves, I understand, are leasing the hospital and are going to operate it," and that "Dade County is putting in as much money or more than we are putting in the hospital * * *" (II A.

1286). The trustees agreed to this reduction (II A. 1285–1287). In actuality, Dade County never intended to nor did it ever invest in the hospital (II A. 1282–1283).

b. Two conditions for the loan were prescribed: (1) the sponsors were required to make a $200,000 escrow deposit in substitution for the earlier $950,000 requirement (II A. 1271); and (2) Kovens was required to obtain a construction bond from a bonding company, which had agreed to write the bond only if Kovens showed evidence of a $250,000 investment in the hospital (II A. 1278–1290, 1293, 1313–1314). Kovens borrowed $250,000 from a Miami bank (on a note cosigned by Irving Kipnis, who had furnished Fashion Mart to George Burris in connection with the First Berkeley transaction (G. 352; see *supra*, p. 24)), and used that amount both to satisfy the bonding company requirement and the $200,000 escrow deposit requirement. The Pension Fund then paid part of funds committed on the loan (II A, 1267–1270, 1311, 1269–1272, 1280). In actuality, Kovens had withdrawn the entire $250,000 and used it to purchase a certificate of deposit from the bank as security for the original loan, with the agreement that the bank would not call up the loan for several months. Subsequently Kovens cashed in the certificate of deposit and repaid the bank (G. 347–350).

c. In June 1961, several months after the disbursement of the original loan, an additional $500,000 was requested for "an increase in the size of the building" (II A. 1270, 1316). Hoffa subsequently advised his fellow trustees that the $500,000 loan thereafter

granted had been used "to add another floor" to the hospital (II A. 1540). At that time, the hospital contained three useable floors; at the time of the trial no additional useable additional floor had been added, even though the additional $500,000 had long been disbursed (II A. 1305, 1325; III A. 1821, 1829, 1992). After the hospital was built, Sager paid Kovens a fee of $200,000 and sold him a 90 percent interest in the hospital for $20,000 (II A. 1318).

C. OTHER LOAN TRANSACTIONS

In addition to the five major transactions already described, the government introduced evidence of other Pension Fund loan transactions in which various of the petitioners were involved.

1. *The Strecker-4306 Duncan transaction*

In 1959, Fred Strecker, a Pension Fund trustee, was seeking a loan to finance a property acquisition in St. Louis, Missouri, by the 4306 Duncan Corporation, with which he was involved (II A. 1336–1337). At a trustee meeting in September 1959, he met with Burris who agreed to assist him in procuring a loan, and suggested that they go to Miami to see a friend. Hoffa wished Strecker "good luck" (II A. 1339–1340).

In Miami, Burris and Strecker met with Dranow and Vaughn Connelly of the New Everglades (see *supra*, pp. 10–13). During the course of these consultations, Dranow said he ha dspoken to Hoffa on the telephone (II A. 1426–1427). In October and November 1959, through the activities of petitioner Burris, a Pension Fund application for 4306 Duncan was

processed in the name of one Max Federbush who, in early December 1959 (before the application was passed upon by the trustees), was told by Burris that he was out of the deal (II A. 1346–1371). About two weeks later, just before he entered the trustee meeting which was to consider the loan application, Strecker met Dranow who told him that the application was going to be presented "in the name of a straw party" (II A. 1346). Strecker was distressed over this and objected to Hoffa about such a procedure. Hoffa said: "If that's what you want. Do you want the loan or not?" (II A. 1347). The loan was thereafter approved by the trustees on Hoffa's motion (II A. 1348). Although there is nothing in the minutes to show it, both Hoffa and Strecker testified that prior to the trustee vote Hoffa advised the trustees that "[t]his application is a property that [Strecker] is interested in" (II A. 1347). Strecker's 4306 Duncan Corporation ultimately received $840,000 from the Pension Fund (II A. 1349).

2. *The Kipnis-Causeway Inn transaction*

In 1960, Irving Kipnis who had been involved in the First Berkeley transaction (see *supra,* p. 24), asked George Burris to help him get a Pension Fund loan to build the Causeway Inn. Petitioner Burris thereafter prepared an application for a $1,500,000 loan (II A. 1384).[24]

[24] In 1958, after Kipnis had been turned down by the Fund on a loan application, Burris told him he had not presented his application in the right manner and that if, in the future, Kipnis had "a reasonable proposition" he should contact Burris (II A. 1383–1384).

While the application was pending, Burris asked Kipnis to buy a 10% interest "in a group" being formed to buy the land belonging to Sun Valley; Union Land and Home Company had been formed for this purpose, by Burris (see *supra,* p. 9). Kipnis asked if "that was a piece of land about which there had been some talk that Mr. Hoffa or the Pension Fund was involved," and Burris agreed (II A. 1385). Kipnis gave Burris $57,000 for an option on 10 percent of Sun Valley with the further agreement that it would turn into a loan if Kipnis decided not to exercise the option (II A. 1386).[25]

In October 1960, Kipnis received a $1,500,000 Pension Fund loan (II A. 1387–1388), and Kovens was hired to build the Inn (II A. 1388). In Mid-1961 and 1963, with Burris' aid, at a fee of $15,000 plus half interest in Causeway, Kipnis received another $350,000 Pension Fund loan (II A. 1389–1390).

a. The Simon-Airport Hotel transaction

Between 1959 and 1961, George Simon,[26] with Burris' assistance, secured $3,000,000 in loans for the construction of hotels at the Miami and Birmingham airports. Simon paid Burris $85,000 in "fees" for the latter's services in procuring the loans.

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[25] This money was used to rehabilitate Sun Valley (see *infra,* p. 33). It was repaid by Burris in 1961 out of fees he received for procuring the loan for Causeway (II A. 1390–1391).

[26] Simon was a Miami accountant whose stationery Burris had used to make the March 12, 1960, representations to the Pension Fund to procure a loan for First Berkeley (see *supra,* p. 23).

4. The Club 300 transaction

In June 1961, one James Dioguardi advised Hoffa that he wanted a Pension Fund loan to develop some land in New Jersey. Hoffa told him to see Burris for assistance in preparing a loan application (I A. 582–583). After a series of meetings, Burris and Dioguardi decided to apply for a loan on the "Club 300" in New Jersey (I A. 583–584).

Dioguardi ultimately received a $900,000 Pension Fund loan (II A. 1411–1412). Burris' son, Herbert Burris (who was acquitted by the trial judge at the close of the government's direct case) received a fee of $12,000 and was put on the Club 300's payroll as an employee of the club. He actually did no work for the club (I A. 584–585; II A. 1392–1393).

D. THE DIVERSION OF FUNDS TO SUN VALLEY

We have already detailed (see *supra,* pp. 7–8) Sun Valley's difficulties in 1958 and the fact that Hoffa's Detroit local had $400,000 "frozen" in the Florida bank. Within three years—the major part of the period when the loan transactions were taking place—the various difficulties were settled. In October 1959, Union paid the Detroit local some $37,000 in interest on its restricted account (II A. 1554); paid Lower $18,000 for his stock in Sun Valley (II A. 1407–1408, 1466, 1554, 1556); paid off all the debts of Sun Valley (some $600,000) (II A. 1399), including its $400,000 debt to the Florida bank (II A. 1399). The result was that the Detroit local was allowed to withdraw its $400,000 from the Florida bank (I A. 588–598), and

Sun Valley was withdrawn from reorganization and judicially declared to be solvent (II A. 1403).

A portion of the monies used to these ends are directly traceable to the Pension Fund loan proceeds heretofore described. Additional funds, while not traceable directly, are so closely connected with petitioners and the various companies procuring loans from the Pension Fund as to justify the inference that they were siphoned from loan proceeds:

1. Creditors of Sun Valley were paid in part with $50,000 from Hyman's Key West Foundation; $50,000 from Strate's Fontainebleu, and $43,000 from First Berkeley (see G. 150–152, 153–161). The interest (some $37,000) paid by Union to the Detroit local on its $400,000 in the Florida bank was derived in part from Pension Fund loans to Hyman's Key West Foundation, First Berkeley and Vaughan Connelly (G. 164–166, 166–168). In addition, $18,000 which Burris used to purchase for Union the Sun Valley stock of Henry Lower was derived from the Kovens' Construction Company account in a Miami bank (86 Tr. 12878–12879; G. 161–164). Kovens' Construction Company had been paid fees from Pension Fund loans for work done at Connelly's New Everglades (see *supra,* pp. 10–13). It later received fees for construction of the Good Samaritan Hospital (see *supra,* pp. 25–28) and the Causeway Inn (see *supra,* pp. 29–30).

2. At the same time, Dranow convinced various Miami businessmen to purchase shares in Sun Valley for $250,000 (II A. 1404–1405; see also II A. 1400, 1402). Through an emissary, Dranow contributed $143,000 (compare II A. 1402–1403, III A. 2030, with

III A. 1865). Of this amount $57,000 was the check Irving Kipnis of the Causeway Inn had earlier given to George Burris (III A. 1865–1866, see *supra*, p. 30).

ARGUMENT

Petitioners tender for review a variety of issues, none of which has importance outside of its particular factual context. No significant or recurring question of law or conflict among the circuits is involved. There is, in short, no reason for further review by this Court.[27]

1. The evidence (set forth in the Statement, *supra*, pp. 4–33) established, as the majority of the court below found, a unitary criminal scheme in which each of the petitioners played diverse but complementary roles.[28] The core of the scheme was the fraudulent procurement of money for the personal benefit of petitioners from the Pension Fund; the unlawful conduct of all the conspirators began with and was prompted by a scheme to save the Sun Valley venture from bankruptcy. Falsely inflated loan applications were filed with the Fund and they were approved by exploiting petitioner Hoffa's position of trust and dominance on the Board of Trustees of the Fund. Petitioner Hoffa's principal purpose in the criminal plan was the financial rehabilitation of the Sun Valley

[27] For the Court's convenience, our Argument follows the sequence adopted by petitioners.

[28] Since the conspiracy count conviction fully supports the sentence imposed on each petitioner, there is no occasion to determine the sufficiency of their convictions on the various substantive counts. *Lawn* v. *United States*, 355 U.S. 339. Nor do petitioners challenge the sufficiency of the evidence on these substantive counts.

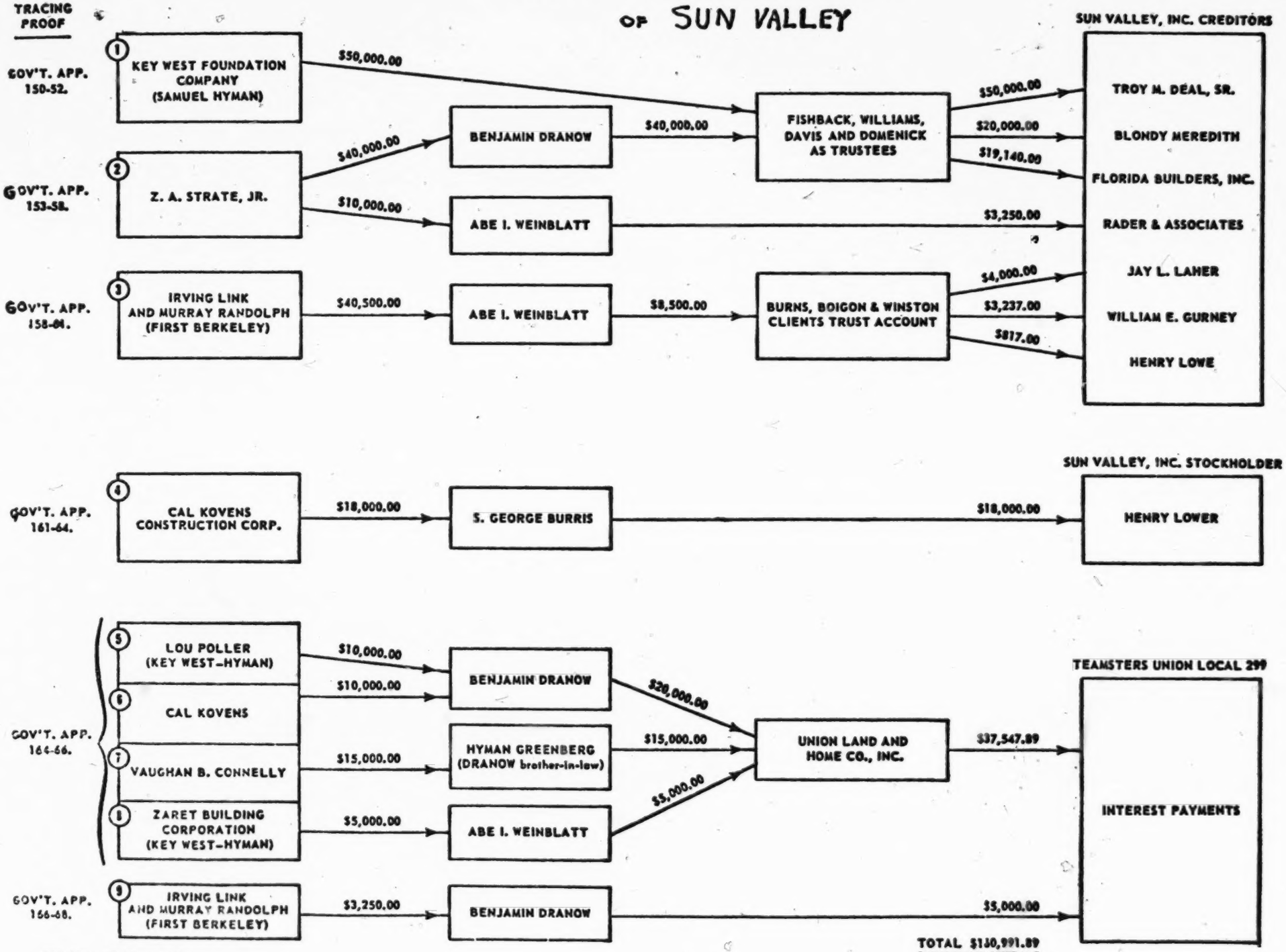
enterprise since he had been harmed by public disclosure of the involvement of Teamster Funds in that venture. Dranow and Burris (and, to a lesser extent, Kovens), who were variously Pension Fund "borrowers", agents for the procurement of loans and participants in the rehabilitation of Sun Valley, assisted in rescuing Sun Valley and were also motivated by desire for personal enrichment—increasingly so as their efforts on behalf of Sun Valley revealed the ready opportunity for individual financial gain from Pension Fund loans. Strate and Hyman were primarily borrowers from the Fund who, knowing of the overriding goal, joined the scheme with the understanding that to obtain loans for themselves and their projects they would have to divert funds to Sun Valley. Weinblatt, whose lesser role was recognized by the trial judge in imposing sentence,[29] participated as Dranow's *alter ego* in several of the transactions. The extrication of Sun Valley was thus both the catalyst for the scheme and the cohesive link which bound petitioners together.

In short, this case is not governed by *Kotteakos* v. *United States,* 328 U.S. 750,[30] (as petitioners argue Pet. 56–61), but by *Blumenthal* v. *United States,* 332

[29] He was confined for 1 hour in the custody of the United States Marshal and fined $5,000.

[30] In *Kotteakos*, the government conceded in this Court that its evidence established eight legally separate conspiracies but argued that the defendants were not fatally prejudiced by the joinder. In rejecting this argument, the Court concluded that, in the circumstances of the case, reversible error flowed from the joinder because of the "dangers of transference of guilt from one to another across the line separating conspiracies, * * *" (328 U.S. at 774).

THE FINANCIAL REHABILITATION OF SUN VALLEY



U.S. 539. Here, as in *Blumenthal,* all the participants were "parties to the larger common plan, joined together by their knowledge of its essential features and broad scope, though not of its exact limits, and by their common single goal." 332 U.S. at 558. Surely—as even the dissenting judge below recognized (Pet. App. A 60)—petitioners Hoffa, Dranow and Burris, who were involved in all or a preponderant number of the fraudulent loan transactions, cannot complain that they were charged with too few conspiracies. See *Canella* v. *United States,* 157 F. 2d 470, 478–479 (C.A. 9); *Quirk* v. *United States,* 161 F. 2d 138, 142 (C.A. 8); *Ritter* v. *United States,* 230 F. 2d 324, 329 (C.A. 10); *Monroe* v. *United States,* 234 F. 2d 49, 54 (C.A.D.C.), certiorari denied, 352 U.S. 873; *United States* v. *Sing Kee,* 250 F. 2d 236, 242 (C.A. 2), certiorari denied, 355 U.S. 954. Kovens, Strate and Hyman participated in fewer of the conspiracy's loan transactions but they were fully cognizant—at least as much as the salesman-defendants in *Blumenthal*—that their acts were part of a larger scheme to enrich the principal participants and to extricate Sun Valley from its financial difficulties.

The testimony of Strate's partner that Strate had told him of a meeting at which Dranow demanded that Kovens, Hyman and Strate put up $50,000 each to assist the Sun Valley project (II A. 1084) is indicative of the nexus among the conspirators and ties them into a single unlawful venture. The attached chart, which traces a substantial portion of the funds used for the rehabilitation of Sun Valley, shows how petitioners Kovens, Hyman and Strate

were substantially involved in funneling money to that venture.

It is not significant that the government's evidence did not show that Hoffa was aware of every detail of the arrangements among Dranow, Burris, Kovens and the other borrowers. The proof clearly justified the inference that he knew that they were working together to drain off money from the Pension Fund to Sun Valley. Similarly, it was not fatal to the government's case that Strate and Hyman did not participate in all the loans, since the proof plainly showed that they were aware of the general scheme and knew that the price for their loans was to join the plan to rescue Sun Valley. It is well established that conspiracy is not fragmented into separate crimes because the conspirators may have had different motives or objectives. See *Pinkerton* v. *United States*, 328 U.S. 640, 643; *United States* v. *Manton*, 107 F. 2d 834 (C.A. 2), certiorari denied, 309 U.S. 664; *May* v. *United States*, 175 F. 2d 994, 1002 (C.A.D.C.), certiorari denied, 338 U.S. 830; *United States* v. *Beck*, 118 F. 2d 178, 182–183 (C.A. 7), certiorari denied, 313 U.S. 587.

Nor did the trial court err in permitting all the admitted evidence to be considered against each petitioner. See *Isaacs* v. *United States*, 301 F. 2d 706, 724 (C.A. 8), certiorari denied, 371 U.S. 818; *Koolish* v. *United States*, 340 F. 2d 513, 522–523 (C.A. 8), certiorari denied, 381 U.S. 951; *United States* v. *McCormick*, 309 F. 2d 367 (C.A. 7), certiorari denied, 372 U.S. 911; *United States* v. *Zuideveld*, 316 F. 2d 873, 878 (C.A. 7), certiorari denied, 376 U.S. 916. In pro-

senting the evidence upon which this complex scheme could be evaluated, the government was obliged to show the complicated and continuing relationships among the parties, the variety of roles played by each, and the mechanics of the various transactions. See *United States* v. *Dardi*, 330 F. 2d 316, 332 (C.A. 2), certiorari denied, 379 U.S. 845, 869. Evidence pertaining to loans which did not demonstrably assist the Sun Valley enterprise was admissible against all the conspirators, for example, to show the general nature of the scheme—*i.e.*, Hoffa's active promotion of loans for which Burris and Dranow had been promised fees.[31] As the Second Circuit observed in *United States* v. *Dardi*, *supra*, 330 F. 2d at 329: "Those who participate in such transactions do not supply the government with a simple and clear picture. The picture, even as on a jig-saw puzzle, only comes into vision by the assembling of hundreds of curiously shaped parts, each piece seemingly having no identity until it is fitted into and made a part of the whole." See also *Capriola* v. *United States*, 61 F. 2d 5, 13 (C.A. 7), certiorari denied, 287 U.S. 671.

Nor was this a case in which confessions admissible only against one party but naming other defendants were introduced in evidence.[32] The evidence

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[31] The Miracle Plaza loans, concerning which very little evidence was introduced, were similarly relevant to show the relationship among the parties, particularly to indicate how Dranow would refer to his prior successful dealings with the Pension Fund in order to impress prospective borrows.

[32] In *United States* v. *Wortman*, 326 F. 2d 717 (C.A. 7), on which petitioners rely (Pet. 59-60), a mass of evidence, some dealing with declarations of one conspirator against another

concerning loans which did not involve petitioner Strate and Hyman revealed the pattern whereby petitioner Hoffa's domination of the Pension Fund was, with his active cooperation, used by the other petitioners to drain off money for his benefit and for theirs. It did not impermissibly prejudice the jury against any of the less directly involved conspirators because its only effect as to them was to establish precisely what could permissibly be proved against them—the nature of the conspiracy which they voluntarily joined.

There is no substance to the claim (Pet. 60–61) that the trial court failed adequately to instruct the jury that it could convict on the conspiracy count only if the evidence established that the petitioners were involved in a single conspiracy. The jury was specifically told that, to convict any defendant on a substantive count, they were required to find that he had been a party to the overall scheme and, with respect to the conspiracy count, that he had been a member of the conspiracy alleged in the indictment (III A. 2139–2141, 2143–2144). The indictment, which the court read to the jury, made clear that the petitioners were charged with being members of a single conspiracy (see III A. 2113–2132), and the court referred to "the scheme charged in the indictment" (III A. 2139; see also III A. 2140, 2141). With specific reference to the conspiracy charge, he informed the jury that it "charges the defendants on

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without any proof *aliunde* of the conspiracy, and some involving different persons and different time periods, was improperly admitted in evidence as proof of the conspiracy.

trial with the crime of conspiracy;" that to warrant conviction the government had to prove beyond a reasonable doubt "the existence of a conspiracy" (III A. 2142; emphasis added); and that, while it need not be shown that a defendant knew all the members, or all the details of the conspiracy, it was essential that "a defendant was aware of the common purpose, and that he was a willful participant" (III A. 2143). The instructions adequately stressed that the jury had to find a single conspiracy to support a finding of guilt. Petitioners point to no requested instructions relevant to this contention which were refused by the trial court.

2. Viewed against the factual background which prompted his action, the fact that the trial judge had the bailiff deliver the indictment to the jury shortly after deliberations commenced, without advising the parties or counsel of his action, did not constitute reversible error (see Pet. 18–21, 61–65).

Early in his discussion with counsel concerning the instructions, the trial judge indicated his concern that the jury would need guidance in relating the proof to the twenty-one remaining counts of the indictment.[*] He therefore proposed to give the jury verdict forms which would identify the counts by the transactions with which they dealt—*e.g.*, "Everglades in regard to count 2" (see I A. 55). The court felt that otherwise the numbers of the counts would mean "nothing to them" (G. 194). The next day, all defense counsel

[*] Seven substantive counts had been withdrawn from the jury at the close of the government's case-in-chief (III A. 1773).

rejected this suggestion." When the court asked for "any suggestion as to how the jury could identify counts if all they have is numbers," the defense submitted no alternative proposals. On the contrary, counsel for Strate, with the apparent approval of all defense counsel, described the problems as "one of the hazards of a mass trial * * * where the Government chooses to do it in this fashion. I think they have got to meet that hazard" (G. 200-201).

Defense counsel also opposed a proposed government instruction which would have summarized for the jury the remaining charges in the indictment without referring to the seven counts which had been dismissed (G. 203-206; 212-214). Having advised counsel that he "didn't plan to" send the indictment to the jury (G. 204), the judge decided, in view of these objections, merely to read the indictment (G. 219).

At the outset, the trial judge admonished that "the indictment which has been returned by a grand jury is not any evidence of guilt and must not be construed by you as such. Indictments are mere formal charges made by a grand jury after having heard certain evidence presented to it by the government" (III A. 2113). And during his reading of the indictment, the court interjected that it contained "mere allegations * * * which are not proof of anything" (III A. 2115). The court did not summarize the seven dismissed counts, stating that they "are not before the jury, and will be of no concern to this jury" (III A. 2132). After completing his reading of the indict-

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"Government counsel had earlier indicated his approval of the procedure suggested by the trial judge (G. 194).

ment, the judge once again cautioned that the indictment was not evidence and should not be considered by the jury in reaching its verdict (III A. 2123, 2124).

The case was submitted to the jury on a Friday afternoon. Early that same evening, the bailiff, at the request of the jury, delivered a sealed envelope to the court (III A. 2226-2229, 2176-2178) which contained a note signed by all the jurors. It read (III A. 2179-2180; see Pet. 18):

> 1. Document of all counts
> 2. Document of law on all counts
> 3. Document of overt acts named
>
> Please return "

Upon receiving this note, the court gave a copy of the original indictment to the bailiff with instructions to "tell them that pursuant to their request they could have this and nothing more" (III A. 2180). The bailiff testified that he complied with the court's directive (III A. 2180, 2234) and, in response to a more precise question, that he had said nothing to the jurors when he handed the copy of the indictment into the jury room (III A. 2232).

a. The judge committed no error when he gave the indictment to the jury at its request. The court would have been acting well within its discretion had it submitted the indictment to the jury at the outset of its deliberations. See *United States* v. *Press*, 336 F. 2d 1003, 1016-1017 (C.A. 2), certiorari denied, 379 U.S.

" Above these three items, the note contained a list of the remaining counts; on the left side it contained an enumeration of the seven dismissed counts; and on the right side it contained the notation "Work papers" (see Pet. 18).

963. The court could make its own judgment that the jury needed the indictment for its deliberations. Cf. *Robinson* v. *United States*, 210 F. 2d 29, 32 (C.A.D.C.) where it was held to be within the trial court's discretion to deliver exhibits to the jury *sua sponte*. The fact that the court here waited until after deliberations had commenced and the jury had specifically made a request did not constitute error.

Nor were petitioners prejudiced because the jury was given an unexpurgated copy of the indictment. The trial judge—before, during and after he had read portions of the indictment to the jury—repeatedly emphasized that these were merely charges and were not "proof of anything" (see *supra*, p. 40). He specifically noted that the seven dismissed counts were not before the jury and should be of no concern to them (see *supra*, p. 40).

Nor, in light of these warnings, was petitioners' trial rendered unfair merely because the indictment given to the jury alleged that petitioner Hoffa's interest in rehabilitating the Sun Valley corporation was attributable, in part, to the fact that a board of monitors appointed by a United States District Court had questioned, as a breach of his fiduciary duties, the deposit of his local union's funds in the Florida National Bank (I A. 44). Although the district court excluded evidence regarding the board of monitors and did not, for that reason, read this allegation to the jury, there was substantial evidence before the jury that the deposit in the Florida bank had been questioned by a Senate committee and by a Florida grand jury (see *supra*, p. 8). The fact that the indict-

ment sent to the jury room included the allegation regarding the board of monitors did not, in light of this evidence and the repeated warnings that the indictment was not to be considered as evidence, prejudice the petitioners.

b. The facts established at the post-trial hearing with respect to this incident demonstrate that this is not a case involving impermissible exchanges in the absence of counsel between a deliberating jury and a court. The jury asked no questions of law whatever, nor did it in any manner suggest—as did the jury in *Greene* v. *United States*, No. 181, this Term—that it might not be able to reach agreement. What the jury requested was a "document" which it described in terms having little doubt that it was seeking the indictment. That document was sent to it with no substantive communication whatever; if the bailiff said anything when he delivered the indictment it was that that indictment was all the jury would get. In no sense could that remark have affected the jury's deliberations.

This case is, therefore, entirely different from *Shields* v. *United States*, 273 U.S. 583, and the other decisions cited by petitioners, including *Greene* v. *United States*, No. 181, this Term (Pet. 21-24), where supplemental instructions regarding the jury's deliberations were given by the court in the absence of defendants or their counsel.[*] This case involved

[*] The "instruction" in *Greene* was, as we argued in that case, hardly likely to be prejudicial since they consisted only of a directive to "keep deliberating." This case concerns a communication that is even more remotely removed from the substance of the jury's deliberations.

no supplemental instructions, if, in fact, it involved any communication whatever from the court to the jury.

c. There is no substance to petitioners' further contention (not made in the motion for a new trial) that in failing to ascertain the exact nature of the jury inquiry in open court with the assistance of counsel, the trial judge cut off any possibility of correcting any "adverse misconception of some major issue or issues of law or fact or both" which the jury might have had (Pet. 64). The trial judge's delivery of the indictment was prompted basically by his own concern that the jury needed a guide to identify the separate counts, and the jury note merely served to reinforce that view. In any event, the reference in the note to "Document of all counts" and "Document of overt acts named" plainly referred to the indictment.

3. After verdict, petitioners presented an affidavit by alternate juror Pare (I A. 313–314) that on one occasion, during a recess in the trial, while the jury was sequestered at the Great Lakes Naval station, juror Gogerty—who later became foreman of the jury—had shown him a newspaper article from the July 18 edition of the Chicago *Tribune* which referred to the fact that Hoffa's motion for a judgment of acquittal had been denied and that two letters[*] which the government had offered in evidence to discredit the testimony of Dranow had been excluded by the trial judge. (This article is set out in full at I A. 331.) Pare testified that he engaged in no conversation with

[*] These were the "Link-Dranow" letters discussed *infra*, pp. 61–63.

Gogerty or any other juror regarding the article and that he did not overhear any conversation among the jurors relating thereto (III A. 2200-2202). Pare further testified that, during the sequestration, the jury received newspapers from which items had been clipped (III A. 2204).* Pare also testified that prejudicial remarks had been made by jurors during recesses in the trial and that he had kept notes identifying the speakers by different code letters (III A. 2189-2190). The comments allegedly included statements that "there is no honor among thieves"; that the petitioners knew "their goose is cooked or at least in the frying pan"; that the jury was spending a substantial amount of time on the case and the defendants would "just appeal the thing"; and that Hoffa would never go to jail because he had too much money (III A. 2132-2139). Pare also stated that there was very little discussion of the evidence among the jurors (III A. 2203).

Following Pare's testimony, the trial judge rejected the defense request that other jurors be subpoenaed to testify and denied the supplemental motion for a new trial based on Pare's revelations (III A. 2212-2219). This ruling was proper (see Pet. 21-25, 66-69). The one newspaper article did not acquaint the jury with anything which they did not know as a result of the trial. The Link-Dranow letters were

*The newspapers were screened by the marshals responsible for the sequestration of the jury, and items relating to the trial or to the petitioners were clipped before the newspapers were given to the jurors. The article Gogerty allegedly showed Pare appeared in the back of the newspaper in the section normally reserved for obituaries (III A. 2218).

initially admitted in evidence at trial only against Dranow; they were excluded by a later instruction to the jury that they be disregarded (III A. 2065–2066; see *infra*, p. 63). Nor did the remarks of the jurors, even as reported by Pare, amount to comments on the evidence. His testimony was an inadequate foundation upon which to harass the jurors by inquiring into their conduct during the trial of the case. Cf. *McDonald* v. *Pless*, 238 U.S. 264; *Rees* v. *Payton*, 341 F. 2d 859, 865 (C.A. 4); *United States* v. *Crosby*, 294 F. 2d 928 (C.A. 2), certiorari denied *sub nom. Mittelman* v. *United States*, 368 U.S. 934; *United States* v. *Grieco*, 261 F. 2d 414, 415 (C.A. 2), certiorari denied, 359 U.S. 907."

4. None of petitioners' allegations concerning publicity presents an issue warranting review (Pet. 25–28, 70–74).

a. Selection of the jury occupied ten days (consuming 2234 pages of the trial record) and over 500 veniremen were questioned before the twelve jurors and four alternates were actually chosen. As each panel of veniremen entered the box, the judge advised the prospective jurors in detail that what was desired were jurors who could put aside any past opinions and reach a decision entirely upon the evidence pre-

"*Parker* v. *Gladden*, 385 U.S. 363, is clearly inapposite. There prejudicial comments were made by the bailiff assigned to the sequestered jury. His "official character", as the Court noted, gave him great weight with the jury (385 U.S. at 365). Indeed, one juror testified that he was influenced by the bailiff's comment.

sented in court." Each veniremen was asked if he could meet this standard and those who expressed any doubt were excused (see G. 391–392, 399, 407). At the outset of the *voir dire* the court permitted each side fifteen minutes of personal examination for each panel of four veniremen (I A. 397). This limitation was not strictly enforced at first, but its abuse by the defense compelled the judge to announce that he would use his watch to time the questioning of each (I A. 437). After nine days, it became apparent that the time limitation was "of no avail" (I A. 499), and the judge then announced that he alone would carry on the *voir dire* (I A. 497) permitting each side to ask only three supplementary questions (I A. 499–500). The court's limitation on defense inquiry was plainly a consequence of an abuse of the privilege.

The limitation did not hinder the empanelment of a fair jury. In most instances, a juror as to whom further defense inquiry was foreclosed was in fact challenged, either for cause or peremptorily. Compare *Chaves* v. *United States*, 258 F. 2d 816, 819 (C.A. 10), certiorari denied *sub nom. Tenorio* v. *United States*, 359 U.S. 916. Moreover, numerous veniremen voluntarily admitted the possibility of bias without probing interrogation and were excused; those who remained affirmed their lack of bias. While the trial judge foreclosed dilatory defense inquiries he made sure that the jury chosen would give petitioners a fair trial. The court acted well within its area of discretion. See *Conners* v. *United States*,

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[*] See G. 363–364, 375, 380, 384–385, 389–390, 394–395, 400–401, 408–410, 415–417, 422–424, 426–427, 434–436, 441–443, 446–448.

158 U.S. 406, 413; *Yarborough* v. *United States*, 230 F. 2d 56, 63 (C.A. 4), certiorari denied, 351 U.S. 969.

b. In view of the general notoriety of the trial and in order to prevent any outside influence from being brought to bear on the jury, the court properly ordered sequestration of the jury. See, *e.g.*, *United States* v. *Holovachka*, 314 F. 2d 345, 352–353 (C.A. 7), certiorari denied, 374 U.S. 809. Nor were petitioners prejudiced because, early in the trial, the court transferred the sequestered jury to the nearby Great Lakes Naval Training Station. That installation offered self-contained separate quarters [11] where the jury could comfortably be housed and yet be within one hour's drive from the courthouse. Since one of the petitioners had recently been convicted of attempting corruptly to influence jurors in a federal criminal trial, it was reasonable for the court in this case to take appropriate precautions. And there is no factual support for petitioners' surmise that the jury was under the control of the military and was therefore unable to afford them a fair trial.

c. The judge demonstrated full awareness of his responsibility to obtain a jury uninfluenced by publicity and to keep newspaper and magazine reports from the jury. There is no reason to suppose that any juror read or was influenced by the pretrial newspaper and magazine articles to which petitioners refer (Pet. 25–27). On the first trial day after the appearance of a Chicago newspaper article concerning a visit of the then Attorney General, the judge specifically

[11] The jury was occupying a separate rented building at the Naval Station (I A. 609).

inquired of the prospective jurors whether they had read anything over the weekend which might affect their verdict (G. 410, 411–413, 425, 432). Those who expressed any doubt as to their ability to be impartial were excused (G. 411–412, 421, 448).

5. It was not error (see Pet. 29–32; 75–80) to permit the prosecutor to cross-examine petitioner Hoffa regarding his conviction for obstruction of justice which was then pending in the Court of Appeals for the Sixth Circuit. That conviction was subsequently affirmed by the court of appeals (349 F. 2d 20) and by this Court (385 U.S. 293).

a. Reference for impeachement purposes to a conviction pending on appeal has been sustained by various courts. *United States* v. *Empire Packing Co.*, 174 F. 2d 16, 20 (C.A. 7), certiorari denied, 337 U.S. 959;[a] *Bloch* v. *United States*, 226 F. 2d 185, 188 (C.A. 9), certiorari denied, 350 U.S. 948; 238 F. 2d 631, 632, certiorari denied, 353 U.S. 959; see *State* v. *Johnson*, 99 Ariz. 52, 53, 406 P. 2d 403, 404 (1965) and cases there collected. The Second Circuit follows no different rule. That circuit's view is only that it will not even question the propriety of such impeachment where the conviction has been affirmed on appeal—a circumstance which is present here. See *United States*

[a] The claim (Pet. 76, n. 33) that the later Seventh Circuit decision in *United States* v. *Levi*, 177 F. 2d 827, is inconsistent with *Empire Packing* was properly rejected by the court below which said that in *Levi* the question had been deemed error "because Government counsel knew or should have known that a judgment of conviction had not been entered in that case, and that the trial court still had the motion for acquittal under consideration" (Pet. App. A 28).

v. *Owens*, 271 F. 2d 425, 426 (C.A. 2), certiorari denied, 365 U.S. 874; *United States* v. *Cipullo*, 170 F. 2d 311 (C.A. 2). If a valid conviction may be used for impeachment, it would be irrational, we submit, to hold that the cross-examination of a defendant was improper because the jury was permitted to consider his credibility as a witness in light of a conviction which, although it was then being challenged, was subsequently held to be valid. The contrary rule in the District of Columbia Circuit rests, as that court has specifically noted, on its interpretation of a local statute. See, *e.g.*, *Fenwick* v. *United States*, 252 F. 2d 124, 126."

b. There is no factual support for the assertion that the government "manipulated" the sequence of trials in order to obtain a conviction on the obstruction-of-justice charges which might be used for impeachment in this case (Pet. 29–32; Pet. App. A. 32–34). The obstruction-of-justice indictment was returned approximately one month before the indictment in this case (see I A. 342–345, 345–346; G. 1–8), and throughout the fall of 1963 the government, at the district judge's direction, kept the court advised of the status of the obstruction-of-justice case. The trial of that case was delayed because the defendants took interlocutory appeals from the court's disposition of

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[a] Petitioners' added contention (Pet. 31–32) that the obstruction-of-justice conviction is still not final despite its affirmance because motions for new trials are pending in the court of appeals is plainly unsound. On this theory no conviction would be final, no matter how much time had elapsed since affirmance. Since collateral attack on the conviction is always possible, it could always be contended that the conviction might be upset at some future time.

pre-trial motions (G. 7–8, 12–13) and because an attorney for one of the defendants attempted corruptly to influence a prospective juror (G. 22–23). The record shows that, under the close and continuing supervision of the trial judge in this case, the government was permitted to try the obstruction-of-justice charges first because that indictment was returned first. The mere fact that the present indictment may have borne some factual relation to an indictment naming petitioner Hoffa returned in the Southern District of Florida in 1961—which concerned funds relating to the Sun Valley enterprise but not to the Pension Fund—falls far short of establishing the improper motive which petitioners now ascribe to the government.

c. In any event, petitioners' affirmative use of their failure to object to the question *in the presence of the jury*[44] should foreclose their present claim that permitting the question was error. When Hoffa was asked on cross-examination whether he had been convicted of jury tampering, he replied, "Yes, by perjured testimony of an admitted kidnapper" (103 Tr. 14869; III A. 2001–2002). The defense then asserted no objection, doubtless relying on the fact that the question had been put to the judge before presentation of the defense case and had been ruled on by the court favorably to the government. On redirect examina-

[44] Indeed, petitioners did not assert in the trial court that it would be reversible error—as they now claim—to permit the impeaching question to be asked. One of the defense counsel asserted only that "it's totally a matter of discretion" (G. 187–188).

tion, Hoffa's counsel inquired further regarding the obstruction-of-justice conviction and Hoffa testified that it was then pending on appeal (III A. 2016-2017). In closing argument Hoffa's counsel said (III A. 2086):

> But the first thing that Mr. Bittman [government counsel] went to for Mr. Hoffa, like a grip, and it is proper cross-examination—I didn't object—
>
> 'Are you the James R. Hoffa that was convicted in Chattanooga?'

Counsel then argued that the use of the conviction for impeachment purposes before the appeal had been decided, "speaks ill of the [prosecutor's] confidence in that conviction," and further reflects his desire that "it will make you so prejudiced, so angry at Hoffa, that it will almost make you hate him. * * * I think that they hope that it will make you hate him so that it will blind you in the judgment of this case" (III A. 2086-2087).

In view of this background, petitioners are in no position to argue that reference to the conviction constituted prejudicial error. Experienced trial counsel affirmatively advised the jury that the question was "proper cross-examination" and that he "didn't object" (III A. 2086), thereby implying that the defense welcomed the reference to the conviction because it demonstrated the weakness of the government's case. Having chosen to give the jury the impression that he acceded to the question, petitioner Hoffa should not now be permitted to challenge the court's ruling and to claim that he made a proper objection.

6. The claims of trial error (Pet. 32-36, 80-84) are without merit:

a. The names of the jurors need not, under 28 U.S.C. 1864, be read aloud when drawn. By its express terms, the statute requires only that the names of prospective jurors "shall be publicly drawn from a box containing the names of not less than three hundred qualified persons at the time of each drawing." Its mandate is fully satisfied where—as here (see I A. 117, 120, 352, 354-355, 375-377, 382, 387, 390-391)—the drawing is held in a place to which the public has access and where no efforts are made to conceal the fact that a jury is being drawn. *Wilson* v. *United States*, 104 F. 2d 81, 82 (C.A. 5), certiorari denied, 308 U.S. 574, *Hammerschmidt* v. *United States*, 287 Fed. 817, 820 (C.A. 6), reversed on other grounds, 265 U.S. 182, *United States* v. *Standard Oil Company*, 165 F. Supp. 359, 362 (N.D. Ind.). In short, the statute requires a public *drawing*, not a public *announcement* of names.

The decision in *Wagner* v. *United States*, 264 F. 2d 524 (C.A. 9), certiorari denied, 360 U.S. 936, is not to the contrary. While holding that a defendant was not entitled to a list of prospective jurors, the Ninth Circuit observed in that case that it was within the bounds of a trial judge's discretion to *permit* the names of jurors to be read aloud when drawn. It was also within the permissible bounds of the court's discretion in this case to *prohibit* the reading aloud of the jurors' names. After veniremen were either seated or excused, the judge offered defense counsel an opportunity to examine the cards which

had been selected during the public drawing. This adequately insured that the persons examined were, in fact, those whose names had been drawn from the box.

b. Near the close of final argument, the trial judge advised counsel that the 92-year-old mother of juror Lee had undergone major surgery for a broken hip and that her physician did not expect her to survive. The court inquired whether, if Mrs. Lee died during the deliberations, the parties were willing to continue with eleven jurors or whether they would prefer to substitute an alternate juror. Petitioners' counsel argued that juror Lee should be consulted, but that if the court refused to speak to him, an alternate should be substituted (III A. 2094–2107). The court refused to advise juror Lee of the physician's prognosis or to ask him if he would stay in the event of his mother's death (see III A. 2096–2101). Mrs. Lee died a day after the jury verdict (III A. 2207–2208).

Rule 24(c) of the Federal Rules of Criminal Procedure authorizes replacement by alternate jurors if, before deliberation commences, a juror becomes "unable or disqualified to perform" his duties. That language is sufficiently broad to authorize the court to excuse a juror for reasons such as those present here without discussing the question with the juror. It was reasonable for the trial judge to refuse to represent to the juror that his mother was close to death and to conclude, without further consultation, that in the circumstances known to the judge the juror was rendered "unable * * * to perform [his] duties." Indeed, the judge could properly conclude that by

merely advising [illegible] error of the medical prognosis he would be disabling [illegible] emotionally from performing such duties.

c. Petitioners' claim that the judge committed prejudicial error in commenting on the inaudibility of the direct examination of government witness Francis Murtha is insubstantial. Murtha was the executive secretary of the Pension Fund and a Teamster organizer who, when acting in this latter capacity, was directly responsible to petitioner Hoffa (I A. 752, 772). He was called as a government witness to identify certain documents. In the course of his testimony, it became clear that he was an unwilling witness, who rarely indicated any independent recollection of the events about which he was questioned (see *e.g.*, G. 49–50; I A. 783, 785), and only hesitantly identified documents and signatures thereon. In a short period during direct examination, he was told on at least six separate occasions—twice when he was inaudible in identifying documents signed by Hoffa and Burris (G. 47, 48)—to keep his voice up and to stop dropping it at the end of a sentence (G. 46, 47, 48, 52, 53). In response to a further inaudible answer, the court, in an obvious attempt to prod a reluctant witness, advised the jury that "they must assume he is speaking in the affirmative. Because he only drops his voice on certain occasions." As the court immediately explained to defense counsel, his purpose was to have them "ask him to talk louder" (G. 54–55, 58).

By this technique the court was trying to make an unwilling witness respond to interrogation. If the defense had any real fear that the jury would take

the court's remarks literally, it could have asked that the question be re-answered when the witness again lapsed into inaudibility. In fact, this was done on several occasions (see, *e.g.*, 27 Tr. 4654, 4666, 4677). If defense counsel were truly concerned over the tenor of the witness' answers, they could have asked the questions again on cross-examination or sought to have the original questions and answers read aloud by the court reporter.

d. In the course of his final instructions the trial judge charged the jury that (III A. 2141):

> One using a fiduciary position, a position of trust, to obtain benefits is not only performing a breach of trust but is performing an act of [*sic:* should read 'active'] fraud.

This instruction was an accurate statement of settled law. See *United States* v. *Groves*, 122 F. 2d 87, 90 (C.A. 2), certiorari denied, 314 U.S. 670; *United States* v. *Buckner*, 108 F. 2d 921, 926 (C.A. 2), certiorari denied, 309 U.S. 669; *Landay* v. *United States*, 108 F. 2d 698 (C.A. 6), certiorari denied, 309 U.S. 681; see also, *Shushan* v. *United States*, 117 F. 2d 110, 115 (C.A. 5), certiorari denied, 313 U.S. 574. There is nothing to the contrary in *Epstein* v. *United States*, 174 F. 2d 754 (C.A. 6), which held that actual fraud (intentional deception to obtain another's property or rights) and not merely constructive fraud (morally guiltless, but unmerited receipt of benefits through the breach of a legal or equitable duty) was contemplated by the mail fraud statute. The decision in *Epstein* did not hold that one who uses his particular position of trust for the specific purpose of obtain-

ing personal benefit does not commit fraud as that term is used in the mail fraud statute. Considered together with the other portions of the instructions, which appropriately emphasized that proof of *scienter*, wilfulness and fraudulent intent were necessary for conviction (*e.g.*, III A. 2140–2146), the challenged instructions could not have been misconstrued by the jury as a direction that culpable intent was not in issue.

7. There was no reason for the trial court, *sua sponte*, to order an examination as to petitioner Dranow's mental competency to stand trial; nor were the other petitioners prejudiced by being tried with him (Pet. 36–53; 84–90).

a. On the first day of jury selection one of Dranow's attorneys, Mr. Ragano, claimed that Dranow did not communicate "coherently" (1 Tr. 4–5). The government pointed out that Dranow had been found competent in connection with another trial in February 1963 (1 Tr. 8–12), and the court noted that three weeks before the instant trial had commenced (April 6, 1964), the report of a medical examination stated that Dranow had "a good contact with reality" (1 Tr. 17). Mr. Schiffer, Dranow's co-counsel, stated that physicians hired by the defense were in the process of examining Dranow and their reports would be ready shortly (1 Tr. 4, 13). The court said it would proceed with the selection of the jury "with the understanding that some doctors are going to examine him. And whenever everybody has got their reports in, if the evidence warrants it, we will suspend the selecting of the jury and have a hearing on his mental condi-

tion and physical condition" (1 Tr. 18). Dranow's counsel agreed that that was "a satisfactory procedure" (1 Tr. 18, 20).

On the following day (Tuesday, April 28, 1964) government counsel presented an order for the court's signature directing that Dranow be examined "by two psychiatrists and one internist" at the Columbia Hospital in North Chicago (2 Tr. 282–283).[46] Mr. Schiffer objected, claiming that the psychiatric reports were not yet ready but were expected "momentarily," and that defense counsel wanted the committee of physicians appointed by the court to have these reports available (2 Tr. 284–286). Mr. Ragano then requested that the matter be put over "until Friday" since, after the reports of the defense physician are in, it might be unnecessary "to conduct such an examination. It is conceivable, of course, that our doctors may report that he is competent" (2 Tr. 287). Dranow himself objected to a competency examination, asking that his own doctor be present, a condition to which the government did not object (2 Tr. 297–298). The court decided to defer the matter until the defense reports and affidavits were filed (2 Tr. 299).

Three days later (Friday, May 1, 1964) the court, noting that no defense material had yet been filed, asked Mr. Ragano what his plans were. Mr. Ragano

[46] In response to defense inquiry, government counsel stated that the three doctors were not on "any government payroll"; that one of the doctors had testified for the government in one case; and that he had no information in this regard as to the other two (2 Tr. 294).

responded that this was a matter Mr. Schiffer handled (2 Tr. 917).

On Monday, May 11, 1964, counsel were advised of a telegram Dranow had sent to the court requesting that he be permitted to represent himself (see Pet. 50–51). Mr. Ragano again argued that Dranow was mentally ill, requested that he be given a psychiatric examination, and that his trial be severed from that of the other defendants (11 Tr. 2240–2241). Government counsel pointed out that the defense had not, as they had represented, submitted any psychiatric reports providing some "foundation in fact" for the claim of mental incompetency (11 Tr. 2242). Dranow was then brought into chambers and said he was willing to proceed with Messrs. Ragano and Schiffer as his counsel (11 Tr. 2258–2259).

Following further discussion the court denied the motions for severance and mental examination (11 Tr. 2260). No psychiatric reports were ever submitted to the court by defense counsel.

b. These facts afford no basis for the belated claim that the trial court should, *sua sponte,* have ordered a mental examination of Dranow. It was defense counsel who asked that such an examination be postponed until the reports of defense psychiatrists were ready. The fact that no such reports were ever submitted constituted an abandonment of the claim of mental incompetency. It could properly have been construed by the court as suggesting that defense psychiatrists had found Dranow competent to stand trial—the conclusion reached after two prior examinations.

The cases cited by petitioners (Pet. 85) are inapposite. In some, there was substantial lay and psychiatric evidence which raised such a *"bona fide* doubt" regarding a defendant's competency to stand trial as to require the trial court to conduct a hearing on its own motion. See *Pate* v. *Robinson,* 383 U.S. 375, 385, 388; *Bishop* v. *United States,* 350 U.S. 961; see also *Hansford* v. *United States,* 365 F. 2d 920, 922 (C.A.D.C.), where the defendant was suffering narcotic withdrawal symptoms during trial, and *Whalen* v. *United States,* 367 F. 2d 468, 470 (C.A. 5), where the defendant attempted suicide prior to trial. Nothing remotely comparable was shown in this case. In *Pouncey* v. *United States,* 349 F. 2d 698 (C.A. D.C.) (Pet. 85–86, 88), the critical facts justifying the court of appeals' conclusion that a remand for a competency hearing was necessary were defendant's claims, made at least twice during trial, that appointed counsel was "in cahoots with the Government," and lay testimony that the defendant was insane. There were no similar incidents or testimony in this case. The excerpts from Dranow's remarks to the judge, quoted in the petition for certiorari (Pet. 38–51), state only that Dranow did not want his lawyers to claim he was insane.

Nor was Dranow's conduct during trial suggestive of irrationality requiring the judge on his own motion to order a competency hearing. Dranow's direct examination leaves no doubt that he understood the nature of the proceedings and was fully able to communicate with counsel and to prepare his defense. His detailed, knowledgable, and exculpating

explanations of the numerous financial transactions about which his counsel inquired make crystal clear that he must have had extensive rational discussions with counsel prior to his taking the stand (see III A. 1860–1885, 1886–1889).

The contentions of the other petitioners (Pet. 90) that it was unfair to try them with petitioner rests essentially on the fact that Dranow had a short temper and was not the kind of a person who would impress a jury. This is not a ground for severance. The evidence of petitioners' involvement in the scheme was more than ample. They should not be heard to complain because they were tried together with someone with whom they chose to associate in the criminal venture. See *United States* v. *Aviles*, 274 F. 2d 179, 193 (C.A. 2), certiorari denied *sub nom. Evola* v. *United States*, 362 U.S. 974; *United States* v. *Bentvena*, 319 F. 2d 916, 930–932 (C.A. 2), certiorari denied *sub nom. Ormento* v. *United States*, 375 U.S. 940.

8. On direct examination, petitioner Dranow testified, *inter alia*, that money used to remove Sun Valley from reorganization was not derived from Pension Fund loan proceeds, that there was no requirement for other petitioners to contribute to that purpose and that he received no finders' fees for obtaining Pension Fund loans (see III A. 1865–1867, 1868). On cross-examination, Dranow was asked whether he had ever written a letter to S. George Burris stating (in pertinent part) that "[e]verything can be blamed on me, and everything that could be put on me to protect others should be blamed on me" (G. 1001; III A. 1910). In response to defense objections to the

question, government counsel stated that his purpose was to impeach the credibility of the witness and that the question would be followed up. The trial judge thereupon overruled the defense objections and instructed the jury to consider the question only as to Dranow (III A. 1911–1914). Dranow responded that the letter was in his handwriting and he must have written it although he had no memory of doing so. Nor did he recall when he had written it, or to whom he had sent it. He also stated that he did not know whether the letter was addressed to S. George Burris since he had several friends named George (III A. 1914–1915).

Dranow was then asked if he had written a letter stating that he wanted sums of money ($10 and $15) put away for him daily, naming various petitioners (Burris, Hyman and Kovens) and referring to certain of the properties involved in some loan transactions (*i.e.*, "The California buildings," and the "Fashion Mart Building") (G. 1002). After defense objections to this question were overruled and the jury was again admonished to consider the inquiry only as against Dranow, he answered that he did not recall writing the letter, but that it was in his handwriting and that therefore he must have written it. He also did not recall whether he had the two letters delivered to Irving Link (G. 195–197).

Link (who was involved in the First Berkeley loans, see *supra*, pp. 22–25) thereafter testified for the government on rebuttal that in September 1962 he had a conversation with Dranow, who was then very distraught, and that Dranow spoke about leaving the coun-

try. Either during this conversation or in a telephone conversation about a week or ten days later, Dranow told Link that there would be mail addressed to one "Buck Traube" which would be for him. Link subsequently picked up an envelope addressed in this manner and found the two letters therein. (III A. 2018–2021). Both before and after Link's testimony, the jury was instructed to consider the evidence only against Dranow (III A. 2018, 2021).

Later in the trial, after extended discussion with counsel, the court concluded that while there was basis for using the letters to impeach Dranow, its relevance in this regard was outweighed by the danger of prejudice to the other defendants (III A. 2054–2062). Accordingly, the court finally instructed the jury that, in arriving at a verdict, they were to disregard the testimony of Dranow and Link relating to the letters (III A. 2065–2066).

Considering the totality of the other evidence against petitioners, together with the fact that the trial judge repeatedly admonished the jury that they were not to consider these letters or the testimony relating thereto against anyone but Dranow, petitioners' claim of prejudice would have failed even if the court had ultimately adhered to its original ruling. *Delli Paoli* v. *United States,* 352 U.S. 232, 242; *Opper* v. *United States,* 348 U.S. 84, 95. The fact that the court, in an exercise of extreme caution, ultimately excluded the letters altogether does not give petitioner any greater rights in this regard. Cf. *Spencer* v. *Texas,* 385 U.S. 554.

Pursuant to the policy set forth in our Supplemental Memorandum in *Schipani* v. *United States*, No. 504, this Term, 385 U.S. 372, we have conducted a review to determine whether electronic eavesdropping or wiretapping affected the convictions of any of the petitioners. We have found nothing in that review warranting notification to this Court or any further proceedings in this regard with respect to petitioners Hoffa, Dranow, Strate, Weinblatt, Kovens and Hyman. With respect to petitioner Burris, we find that pursuant to the Departmental authorization described at pages 2–3 of the Supplemental Memorandum for the United States in *Black* v. *United States*, 385 U.S. 26 (No. 1029, O.T. 1965), the Federal Bureau of Investigation, on or about January 21, 1963, installed a microphone by trespass in the office of Benjamin Sigelbaum in Miami, Florida, and that petitioner Burris apparently visited Sigelbaum's office on one occasion during the period of this surveillance, which continued to July 12, 1965. At that time Burris engaged in a conversation which was overheard. The only participants in the conversation, which occurred on December 2, 1963 (approximately six months after indictment), and lasted less than half-an-hour, were Burris and Sigelbaum. A verbatim transcript of that conversation appears in the F.B.I. logs.

In substance, Burris discussed his personal financial problems and the possible transfer of his ten percent interest in Sun Valley, Inc., to Sigelbaum. Sigelbaum discussed a prior claim he had against Burris' interest, and Burris told Sigelbaum that he (Burris)

had paid for his interest in Sun Valley by borrowing $57,000 from Irving Kipnis, which he later repaid from a fee given him by Kipnis. Sigelbaum thereafter inquired about the nature of the charge on which Burris had been indicted, asking whether it concerned income tax. Burris replied that it did not and that the government would be unable to prove conspiracy. Sigelbaum named an individual who had experienced difficulty in obtaining a Pension Fund loan and suggested that he might be a good defense witness. Sigelbaum asked about petitioner Hyman and was told by Burris that Hyman had spent the money he had borrowed from the Pension Fund on his projects, albeit not for precisely the items for which he had applied.

The contents of this conversation were summarized in a report which was sent to some of the government attorneys who prosecuted the case, but any information contained therein that was remotely relevant to the facts of this case was already known to them from other sources. The conversation was never used as the basis for any investigative lead by the government attorneys, the Federal Bureau of Investigation or any other government agency. Prior to the overheard conversation, Burris had made the statement regarding the Kipnis loan to Special Agents of the Internal Revenue Service on January 31, 1963, and Kipnis had testified in detail regarding these transactions before the grand jury on September 18, 1962. He also testified fully at trial with regard to this transaction (Tr. 8891–8893). The possible witness mentioned in the conversation never testified, and the government does

not, to this day, know who he is or his relation to any of the parties or transactions involved in this case.

In these circumstances, we make the following observations:

(1) With respect to all petitioners other than Burris, we believe that this Court should act on the petition for certiorari and our brief in opposition on the record presently before it. None of these petitioners was a party to the monitored conversation which, at most, related to a minute, peripheral aspect of the many transactions underlying the charges in this lengthy trial.

Although we emphasize, at the outset, that *none* of the evidence introduced at trial was directly or indirectly obtained by any official impropriety, we believe it is well established that even if the monitoring had produced a lead to a source of evidence which was introduced at trial, the only defendant who could prevent such evidence from being used against him would be the person whose "right of privacy of person or premises" had been invaded. *Wong Sun* v. *United States*, 371 U.S. 471, 491–492, and the many cases that have followed it in the circuit courts of appeal,[46] make

[46] *Armada* v. *United States*, 319 F. 2d 793, 796 (C.A. 5), certiorari denied, 376 U.S. 906; *Staples* v. *United States*, 320 F. 2d 817, 820–821 (C.A. 5); *United States* v. *Haley*, 321 F. 2d 956, 959 (C.A. 6); *Murray* v. *United States*, 333 F. 2d 409, 411–413 (C.A. 10), certiorari denied, 383 U.S. 949; *Fisher* v. *United States*, 324 F. 2d 775, 780 (C.A. 8); *United States* v. *Konigsberg*, 336 F. 2d 844, 846–847 (C.A. 3), certiorari denied, 379 U.S. 933; *Diaz-Rosendo* v. *United States*, 357 F. 2d 124, 130–134 (C.A. 9); *Elbel* v. *United States*, 364 F. 2d 127, 136–138 (C.A. 10), certiorari denied, 385 U.S. 1014; *United States* v. *Bozza*, 365 F. 2d 206, 222–223 (C.A. 2); *United States* v. *Granello*, 365 F. 2d 990, 995–996 (C.A. 2), petition for cer-

it clear that even if petitioner Burris were able to object to the use, against him, of evidence obtained as the result of a lead produced by the listening device, his co-defendants would have had no standing to complain of the use of such evidence against them. In *Wong Sun* federal officers arrested James Wah Toy in his home on a narcotics charge. They found no narcotics on the premises, but Toy stated that "Johnny" was selling narcotics. The agents thereupon went to Johnny Yee's house, where Yee produced narcotics and stated that he had obtained them from Wong Sun. Wong Sun was then arrested, and he and Toy were convicted of transporting and concealing narcotics. This Court held that probable cause did not exist for Toy's arrest, that statements made by him at the time of arrest were, therefore, inadmissible against him, and that the narcotics taken from Yee—having been traced as a consequence of Toy's illegal arrest—were also inadmissible against Toy. The Court—apparently unanimously—sustained their admissibility against Wong Sun, however, noting that their exclusion as to Toy was required solely by their tainted relationship to information unlawfully obtained from Toy, and not by any "official impropriety" connected with their surrender by Yee. Their seizure, the Court said, "invaded no right of privacy of person or premises which would entitle Wong Sun to object to its use at his trial." 371 U.S. at 492.

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tiorari pending, No. 750, this Term; *United States* v. *Beigel*, 370 F. 2d 751 (C.A. 2), petition for certiorari pending, No. 1120, this Term. See also *People* v. *Portelli*, 15 N.Y. 2d 235, 205 N.E. 2d 587, certiorari denied, 382 U.S. 1009.

Nor does the *Wong Sun* decision stand alone. It was foreshadowed by this Court's holding in *Jones v. United States*, 362 U.S. 257, 261, that "to qualify as a 'person aggrieved by an unlawful search and seizure' [within the meaning of Rule 41(e), F.R. Crim.P.] one must have been a victim of a search or seizure, one against whom the search was directed, as distinguished from one who claims prejudice only through the use of evidence gathered as a consequence of a search or seizure directed at someone else." See also *Goldstein v. United States*, 316 U.S. 114. It is quite clear from the facts we recite above that the person "against whom the [electronic] search was directed" was Sigelbaum. Whether Burris—who visited on one occasion during the two-and-one-half-year surveillance—comes within the defined class may be arguable, but there can be no doubt, we submit, that the definition in *Jones* does not encompass the other petitioners who were never on the premises at all.

The fact that this case involves convictions on a conspiracy count does not distinguish it from *Wong Sun* (which, indeed, also involved a trial on a conspiracy charge). Where the very objects taken in an unlawful search and seizure are introduced in evidence against all defendants in a conspiracy case, co-defendants have, on occasion, been granted the benefit of a determination that the seizure violated the constitutional rights of another accused. The theory of this rule is apparently that the evidence is returnable on the demand of that defendant and should not, therefore, be available to the government. *McDonald*

v. *United States*, 335 U.S. 451; *Rosencrans* v. *United States*, 334 F. 2d 738 (C.A. 1); and *Schoeneman* v. *United States*, 317 F. 2d 173 (C.A.D.C.). That rationale has no meaningful application here. No statements made during the monitored conversation were introduced in evidence in this case,[47] and no evidence was obtained by "official impropriety" in the sense that the government would be compelled to return it on demand. Even if Burris had known of the monitoring before trial and had moved to suppress the conversation and all leads obtained therefrom at that time, the government would have been permitted to introduce at trial against the other defendants all the evidence actually used.

We note, in addition, that it is entirely clear from the facts of this case summarized above (pp. 5–31, *supra*), that the transaction discussed by Burris (*i.e.*, the Kipnis loan), was peripheral to the main body of the evidence presented at trial. It related to matters which were not, by any means, confidential, and which were well known to the government both as a result of Kipnis' testimony and from Burris' own statements to investigating agents. The convictions of petitioners other than Burris should not be affected by the outcome of a full factual analysis of this single overheard conversation. As to them, therefore, the petition for certiorari should be considered on its merits.[48]

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[47] No government agent testified at trial regarding any admission made by Burris, nor did Burris testify in his own behalf.

[48] In the particular factual circumstances of *O'Brien* v. *United States*, No. 823, this Term, decided March 20, 1967, which concerned substantially fewer co-defendants, a far less complex

(2) With respect to petitioner Burris we emphasize here—as we did in making a similar disclosure in our brief in opposition in *Granello* v. *United States*, No. 750, this Term—that there is and should be a substantial difference between monitoring of consultations between an accused and his counsel and monitoring which, although violative of the Fourth Amendment, does not infringe upon the privacy of attorney-client conferences. In *Black* v. *United States*, 385 U.S. 26, and *O'Brien* v. *United States*, No. 823, this Term, decided March 20, 1967, discussions between an indicted accused and the attorney representing him on that charge were overheard. This Court held that the most appropriate means of removing any doubt as to the fairness of a trial which followed such monitoring was to allow the factual isues to be fully litigated before or during trial. Accordingly, new trials were ordered in both cases.

The present case concerns no intrusion whatever upon attorney-client discussions. It involves a single half-hour conversation between an accused and his acquaintance that was peripherally relevant to the charges underlying the accused's conviction. The discovery, at this juncture, of the impermissible

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charge and monitoring of a consultation with an attorney, we did not assert the co-defendant Parisi's lack of standing as a ground for sustaining his conviction. That case, however, involved the overhearing of conversations with an attorney. While we were of the opinion that it was questionable whether the overheard conversations affected the Sixth Amendment rights of O'Brien, we could not know the degree of relationships among co-counsel so as to be certain whether the Sixth Amendment rights of the co-defendant could be said to have been invaded.

governmental conduct should no more affect petitioner Burris' conviction than would a similar discovery that, unknown to him, his automobile or his residence had been searched by some agency of the federal government. The validity of his conviction would then be drawn in question only if the government were unable to show that the evidence used against him at trial was untainted—*i.e.*, that it had not derived "from an independent source" within the meaning of *Silverthorne Lumber Co.* v. *United States*, 251 U.S. 385, 392.

The circumstances of this case illustrate graphically the disproportionate consequences which would result from an inflexible rule applying the result of the *Black* and *O'Brien* cases to all situations where the government learns, while appellate proceedings are pending, that a convicted defendant had, on some occasion prior to his trial, visited premises which were being monitored and had there engaged in a conversation having some arguable relevance to the charges against him. For if this Court were to apply to petitioner Burris the remedy it has afforded in the *Black* and *O'Brien* cases without any judicial finding that evidence introduced against him was tainted, it would be vitiating, merely because of a remote and theoretical possibility of prejudice, a conviction of a principal defendant in a trial which lasted 13 weeks and required the testimony of approximately 140 government witnesses—one of whom, Stanton Sanson, a central figure in the development of the conspiracy (see pp. 8–9, *supra*), has died in the interim.

That result is not justified, we submit, as a prophylactic measure to deter electronic surveillance by government agents, since the overhearing of Burris' conversation was not purposeful. It is quite clear that in monitoring Sigelbaum's office, the agents were not seeking to obtain evidence against Burris—who happened, quite fortuitously, to visit the premises on a single occasion over a two-and-a-half-year period and engage in a half-hour conversation with the occupant. Nor is this a case like *Black* v. *United States*, 385 U.S. 26, where, because of the extended duration of the monitoring of the accused or the fact that conferences with an attorney had been overheard, this Court concluded that it was necessary to conduct a totally new proceeding in order to insure that the conviction was based upon a demonstrably fair trial. The log of the conversation in this case is ten pages long, and there is no real difficulty in comparing it with the evidence introduced against Burris and with the information already in the possession of the prosecutors at the time of the overheard conversation.

(3) We recognize that when, as is true here, the conversation relates, albeit in a peripheral manner, to the subject-matter of the indictment, the person overheard is entitled to a judicial determination on the question whether evidence used against him was obtained by the exploitation of such monitoring. On the other hand, we call the Court's attention to the fact that the monitoring of Sigelbaum's office became

public knowledge several months ago [49] and that Burris has made no effort since that time to seek hearings directed towards that issue in the district court. While we do not, in all the circumstances, oppose a remand of petitioner Burris' case to the district court for this limited purpose, we firmly believe (for the reasons set out at pp. 66–72, *supra*) that such a remedy would be appropriate with respect to him alone and that any more drastic relief even with respect to his conviction would be inconsistent with this Court's decisions in the area of the Fourth Amendment.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied as to petitioners Hoffa, Dranow, Strate, Weinblatt, Kovens and Hyman. As for petitioner Burris, we suggest that this Court could (1) deny his petition without prejudice to the filing of appropriate motions in the district court or (2) grant the petition and remand the case to the district court for a hearing on the question whether tainted evidence was used against him. At such a hearing the government would produce the F.B.I. log and the report based upon it and would demonstrate that it bore only peripherally upon the evidence ad-

[49] It was disclosed during pretrial proceedings in an unrelated criminal trial which was fully reported in the press. See N.Y. Times, Nov. 17, 1966, p. 21. Apparently as a result of that public disclosure, it was relied upon in a motion filed in another case in this Court. See "Motion for Relief," *Hoffa et al.* v. *United States*, Nos. 32–35, this Term, pp. 11a–13a.

duced at trial and that, even to that limited extent, no information was supplied that the government did not already have from independent sources.

Respectfully submitted.

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